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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OVERTON THOMAS ANTHONY, Petitioner and Appellant, vs. C. J. FITZHARRIS, Superintendent, et al., Respondents and Appellees.	)	No. 21646

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

JEROME C. UTZ
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-3299

Attorneys for Respondents-Appellees

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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APPELLEE'S BRIEF

JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

In an information filed by the District Attorney of Los Angeles County, petitioner was charged with two counts of kidnapping, two counts of forcible rape, and two counts of aiding and abetting forcible rape.

Appellant entered a plea of guilty to one count of forcible rape, namely, count three and on motion of the People, separate allegations charging that appellant

was armed were stricken from the count. Thereafter, appellant's motion to have this change of plea vacated and set aside was denied, and appellant was sentenced to the state prison on his plea of guilty to count three of the information and all other counts were dismissed (TR 86, 87). Appellant filed a timely notice of appeal on June 29, 1964. The California Court of Appeal, Second Appellate District, Los Angeles, California, affirmed the judgment on October 20, 1965, in an unpublished opinion, a copy of which was marked "Exhibit B" in respondent's return to the order to show cause.

Petitioner sought a hearing in the California Supreme Court and said petition was denied on December 22, 1965.

Petitioner has not sought habeas corpus relief in any state court in the State of California.

Petitioner's direct appeal to the California courts was limited to the sole question of whether the trial court had erred in not permitting him to withdraw his guilty plea under the provisions of California Penal Code section 1018.

B. Proceedings in the federal courts

On July 11, 1966, appellant filed a petition for a writ of habeas corpus in the United States Court for the Northern District of California (TR 1). On July

11, 1966, an order to show cause was issued, and on August 11, 1966, the court issued an order dismissing the petition for want of an indispensible party (TR 53). On October 11, 1966, the court issued an order vacating order dismissing petition of August 10, 1966, and for issuance of order to show cause (TR 54). On November 4, 1966, appellee, respondent below, filed an additional return to the order to show cause and points and authorities in opposition to habeas corpus (TR 76). On or about November 17, 1966, appellant filed a traverse (TR 94).

On December 21, 1966, Judge Zirpoli of the District Court filed his order denying the writ (TR 118).

Appellant filed a notice of appeal and on January 25, 1967, Judge Zirpoli granted leave to proceed in forma pauperis and issued a certificate of probable cause (TR 120, 121).

STATEMENT OF THE FACTS

An information was filed by the District Attorney of Los Angeles County charging petitioner with two counts of kidnapping, two counts of forcible rape, and two counts of aiding and abetting forcible rape (TR 79).

On March 31, 1964, petitioner appeared in court with his trial counsel, Crispus Wright. His counsel at

that time advised the court that petitioner wished to enter a new and different plea to count three of the information. The prosecutor then called petitioner's attention to his attorney's request and asked petitioner if he had discussed this matter with his counsel. Petitioner replied that he had. The prosecutor then inquired of petitioner and his co-defendant by asking the following questions:

"MR. CABALERO: All right. Has anyone made any promises to you of reward, probation, lesser sentence, immunity or any advantage whatsoever to be gained by you in pleading guilty?

"DEFENDANT JORDAN: No, sir.

"(Whereupon a discussion of the record ensued between the defendant Anthony and his counsel.)

"MR. WRIGHT: Well, of course, he is not referring to what the policemen say; it's what any attorney or anyone else offered you.

"MR. CABALERO: Well, Mr. Anthony, you understand that if you want to plead guilty to this charge, you will have to do this freely and voluntarily. Only you can do this. Do you understand that?

"DEFENDANT ANTHONY: Yes.

"MR. CABALERO: Now, has anyone at all -- and when I say 'anyone at all,' I mean you are not pleading guilty for any other reason other than for the fact that you are guilty; or are you pleading guilty because someone has promised you something or threatened you in any way?

"DEFENDANT ANTHONY: Well, I plead guilty.

"MR. CABALERO: Because you are in fact guilty, and for no other reason; is that correct?

"DEFENDANT ANTHONY: Yes, sir.

. . . . . .

"MR. CABALERO: All right. Each of you understand that what your sentence will be, no one can tell you; that's entirely up to the judge in the case.

"Do you understand that?

"DEFENDANT JORDAN: Yes.

"DEFENDANT ANTHONY: Yes.

. . . . . .

"MR. CABALERO: All right. Now, Mr. Anthony, to Count III of this Information charging you with the crime of rape, in violation of Section 261.4 of the Penal Code of

California, a felony, how do you plead?

"DEFENDANT ANTHONY: Guilty, sir." (TR 5, 6; Exh. B).

APPELLANT'S CONTENTIONS

Appellant filed a brief with this Court. In this brief appellant makes numerous, vague allegations and attempts to raise numerous issues which were not presented to Judge Zirpoli. Stated hereinbelow are the contentions raised by appellant in his petition for a writ of habeas corpus and which were considered by Judge Zirpoli:

1. The trial court abused its discretion under California Penal Code section 1018 by not allowing petitioner to withdraw his plea of guilty.

2. Misrepresentation by defendant's trial counsel.

3. Policemen at time of arrest violated defendant's constitutional rights under the Fifth, Sixth and Fourteenth Amendments.

SUMMARY OF RESPONDENT'S ARGUMENT

I. Appellant's plea of guilty was voluntarily made and the trial court did not abuse its discretion in denying appellant's motion to withdraw his plea of guilty.

II. A voluntary plea of guilty to the crime charged waives all defenses other than jurisdictional

defenses.

ARGUMENT

I

APPELLANT'S PLEA OF GUILTY WAS VOLUNTARILY MADE AND THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S MOTION TO WITHDRAW HIS PLEA OF GUILTY

As pointed out by Judge Zirpoli in his order denying the petition, the discretion of the trial court under California Penal Code section 1018 does not raise a federal question. Judge Zirpoli held that the allegations that the initial guilty plea was involuntarily made does raise a federal question, but that the record in the instant case indicates that the trial court thoroughly interrogated petitioner at the time he entered his guilty plea and based its refusal to allow withdrawal of a guilty plea on sound reasons. In his order Judge Zirpoli points out that the petitioner has had his day in court. The state court has held a hearing at the trial level on the voluntariness of petitioner's plea and had made written findings, which must be presumed to be correct. 28 U.S.C. § 2254(d), 62 Stat. 967 (November 7, 1966). The record shows that the trial court refused petitioner's request because the court was satisfied that petitioner's plea had been voluntarily made when entered, the story had been corroborated by

co-defendant Jordan, and petitioner was aware of the consequences of the plea, since he had been previously tried and acquitted on a similar offense when represented by the same trial counsel.

II

A VOLUNTARY PLEA OF GUILTY TO THE CRIME CHARGED WAIVES ALL DEFENSES OTHER THAN JURISDICTIONAL DEFENSES

In appellant's original petition for writ of habeas corpus, he contended that he was represented by inadequate counsel and was the subject of police beatings.

As pointed out by Judge Zirpoli, these statements made by petitioner were argumentative and not factual. Judge Zirpoli held that in view of the court's finding that his plea of guilty was voluntarily entered all defenses other than jurisdictional defenses have been waived. Thomas v. United States, 290 F.2d 696 (9th Cir. 1961).

It is respectfully submitted that Judge Zirpoli's finding in this respect is in accord with the case law on this subject and is dispositive of these issues.

CONCLUSION

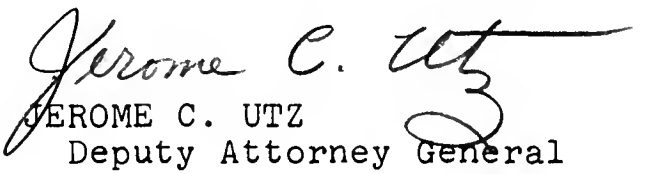
There being no merit in appellant's contentions, we respectfully request that the order denying the writ

be affirmed.

Dated: June 12, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



JEROME C. UTZ
Deputy Attorney General

Attorneys for Respondents-
Appellees.

JCU:pp
CR SF
66-1013

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: June 12, 1967

Jerome C. Utz

JEROME C. UTZ
Deputy Attorney General

Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 21,649

HOLLYWOOD HAT CO.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF PETITIONER HOLLYWOOD HAT CO.

HILL, FARRER & BURRILL,
By KYLE D. BROWN,
411 West Fifth Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioner Hollywood Hat Co.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF PETITIONER HOLLYWOOD HAT CO.

JURISDICTIONAL STATEMENT.

This case is before this Court by way of three petitions, filed on behalf of six petitioners, praying that a Decision and Order of the National Labor Relations Board (reported at 162 NLRB No. 41)[1] be reviewed

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[1]References to the documents reproduced in "Transcript of Record, Vol. I" are made by citation to "Vol. I" and to the page number where the documents appear. References to the steno-

and set aside. As to each of the three petitions the Board has filed a cross petition for enforcement of its order. All six petitioners are engaged in business within this judicial circuit, in the state of California, and the unfair labor practices alleged in the complaint upon which the Decision and Order of the Board was entered allegedly occurred in California. Petitioners are aggrieved by such final order of the respondent cross petitioner (Board) and, therefore, this Court has jurisdiction under § 10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 29 USC § 141 *et seq.* (1958)][2] The Board, in its cross petition and answers to the three petitions, has admitted petitioners' jurisdictional allegations.

INTRODUCTION.

Various of the Licensees at the K-Mart Commerce store, and K-Mart itself, have also petitioned for review and will file separate and independent briefs challenging the Board's conclusion with respect to the appropriate unit and to other matters presented in the underlying representation case. Hollywood Hat Co. joins with and adopts the positions taken by other Petitioners in the consolidated cases, raising and discussing the points above mentioned. In this brief Hollywood Hat Co. shall discuss only a single point, separate from those discussed in the briefs of other Petitions.

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graphic transcript of the unfair labor practice hearing reproduced in "Transcript of Record, Vol. II" and to the stenogaphic transcript of the representation hearing, reproduced in "Transcript of Record, Vol. II-A" are made by citation to the appropriate volume and transcript page number. References to all undesignated exhibits are made by citation to Vol. III and to the appropriate exhibit number.

[2]The pertinent statutory provisions are reprinted, *infra,* at Appendix B.

ARGUMENT.

A. The Board's Certification Contained an Incorrect Unit Description; Subsequent Actions by the Board, General Counsel and Union Have Undermined Whatever Validity There May Have Been to Such Certification; in Light of Such Facts, a Refusal to Bargain Charge Cannot Be Sustained.

The evidence relied upon by K-Mart and the Licensees before the Trial Examiner and the Board in defense of the refusal to bargain charge (case No. 21-RC-9309) raised serious questions as to whether the provisions of the Act had been complied with or were being properly enforced. That evidence demonstrates that the Board committed error in certifying a unit which was erroneous, improper nd incomplete; that the General Counsel committed error in issuing the instant complaint based upon the above certification, and that the Union compounded each error by founding its demand letters and unfair labor practice charges upon such certification.

The Board concluded that these claims of procedural irregularities were "without substance" and found violations of Section 8(a)(5) and (1) of the Act (refusal to bargain) [Vol. I, p. 327].

Yet the weight of evidence is that the Union, the General Counsel and the Board itself have, since the outset of the unfair labor practice case, committed such repeated and substantial errors in their confused and contradictory attempts to enforce the provisions of the Act, as to render baseless the refusal to bargain finding herein.

1. **The Union Charge and Demands for Recognition Were Based on a Defective, Equivocal and Contradictory Certification and Were, Therefore, Improper.**

One of the so-called "joint employees", herein, Besco Enterprises, Inc., was named in the complaint below [Vol. III, G.C. Ex. 1(e)] even though it had admittedly not engaged in business at the K-Mart Commerce store since March 20, 1965, a date prior to the election, which was held on April 7, 1965 [Vol. III, G.C. Ex. 10]. This fact was clearly pointed out by the reply of Besco to the Union's demand for bargaining in which it refused to extend recognition because it had not, since March 30, had any employees in the Commerce store [Vol. III, G.C. Ex. 46(b)]. The same was conceded as true by the General Counsel in the hearing below [Vol. II, Tr. p. 23, lines 16-24].

Moreover, after the election of April 7, 1965, but prior to the Board's certification on September 9, 1965 [Vol. III, G.C. Ex. 40] a new licensee, Zale Jewelry, commenced operations at the Commerce Store. Yet the General Counsel's complaint did not name Zale as a party nor did the Union make demand upon this licensee; this despite the fact that Zale employees fell clearly within the Board's designation of those employees within the appropriate bargaining unit.

A brief history of the Board's vacillation with respect to the unit description herein serves to place this in proper focus. Originally the Regional Director, in the representation case, found the appropriate unit to be "all regular full-time and part-time employees employed at K-Mart's Commerce, California, store, includ-

ing selling, nonselling, and office clerical employees, *and employees of licensees . . .*" [Vol. III, G.C. Ex. 5(a), p. 8]. (Emphasis added).

In contradistinction, the Trial Examiner in the unfair labor practice proceeding, found appropriate a unit which specifically described each licensee by name, including Besco but excluding Zale [Vol. I, p. 309].

On review of the Trial Examiner's Decision the Board modified the latter unit description, noting that neither the Regional Director's Decision [Vol. III, G.C Ex. 5(a)] nor the Board's certification [Vol. III, G.C. Ex. 40] mentioned licenses by name and deleted those names in favor of the prior generic description, "employees of licensees." [Vol. I, p. 326, n. 5].

Thus, although the approved unit embraces *all licensees* and Zale is indisputably such a licensee, at no time did the Union make demand upon Zale to bargain as a joint-employer, nor did the General Counsel request that Zale be included as a party to the unfair labor practice proceeding.

To further confound the issue a demand letter was served on Besco by the Union [Vol. III, G.C. Ex. 46(a)] and its original and first amended unfair labor practice charges named Besco as a party [Vol. III, G.C. Ex. 1(a); 1(c)] even though it knew full well that Besco had ceased doing business at Commerce. To top this off, the General Counsel then issued its complaint charging Besco, together with other "joint-employers" in the unit, with an unlawful refusal to bargain [Vol. III, G.C. Ex. 1(e)].

In the light of this evidence, the Board's conclusion that the certification was clear and the Union demands appropriate, is totally insupportable.

Firstly, the Board claimed that it was never notified either that Besco had ceased operations or that Zale had commenced operations at Commerce [Vol. I, pp. 325-326]. This is patently untrue, as evidenced by the complaint of the Board's General Counsel which specifically alleged: "Zale Jewelry Service Inc., dba Zale Jewelry, herein called Zale, pursuant to a lease agreement with K-Mart, sells jewelry and cameras at the Commerce store . . . Zale operates the same department formerly operated by Besco under the same arrangements with K-Mart which Besco had with K-Mart." [Vol. III, G.C. Ex. 1(e), p. 2].

Therefore, although the Board may not have known of Zale's existence or Besco's removal at the time of the election or the certification, the Board knew that Zale was an active licensee at the time of the issuance of the complaint herein, and should not, under the circumstances, have proceeded with the charge without first clarifying the status of Zale.

Before the Trial Examiner, the General Counsel, recognizing the patent inappropriateness of Besco's inclusion in the unit, requested no order requiring Besco to bargain [Vol. II, Tr. p. 24, lines 1-4] but suggested the Trial Examiner find K-Mart and other licensees, including this Petitioner, in violation of Section 8(a)(5) of the Act, and then allow the Union to cure any defect in its demand, *post facto,* by instituting a separate and subsequent demand upon Zale with

concomitant rights to file a charge if it later refused to bargain [Vol. II, Tr. p. 25, lines 1-24].

In his Decision, the Trial Examiner went much further than even the General Counsel dared suggest. He found that Besco "had been succeeded by a new licensee, Zale," that Zale was "Besco's successor" [Vol. I, p. 308, lines 48-62] and further that ". . . Zale succeeded to the business formerly conducted by Besco. It is settled law that one who becomes a successor employer during the period of the certification is bound by that certification. Zale, as Besco's successor, was and is bound . . ." [Vol. I, p. 309, lines 7-10].

There was not a scintilla of evidence in the record to support the Trial Examiner's finding. Indeed, Zale had never even received a hearing on the issue as to whether it was bound by the certification. Consequently the finding was not (and could not have been) adopted by the Board.

The Board did not, however, consider the Trial Examiner's error to be "material"; rather, taking its cue from the General Counsel's similar suggestion, it "cured" any defect in the certification and demands, in its opinion, by not directing its order to bargain against either Besco or Zale [Vol. I, p. 326, n. 4].

The effect of the Board's decision, then, is to give rise to the complete anomaly that while the unit description includes "employees of all licensees," Zale, admittedly an active licensee, is not subject to its order and not required to bargain. The Court of Appeals for the 6th Circuit acted to prevent a similarly absurd result in *NLRB v. Schnell Tool & Die Corp.,* 359 F.

2d 39 (6th Cir. 1966). There, the Board had sought enforcement of its remedial order against two named corporations which had, subsequent to the rendition of the order, sold their interests to outside corporations. Nonetheless, the Board urged the Court to enter a decree of enforcement against the named parties contending that proceedings could later be had before the Board to determine whether the decree was enforceable against the purchaser corporations.

The Court rejected this extraordinary request as putting "the proverbial cart before the horse" and emphasized that if the Board seriously sought enforcement against the unnamed corporations, it "should institute the necessary proceedings before the Board to secure a determination that the decree is so enforceable," *prior* to its application to the Court for such enforcement.

By the same token, we submit that appropriate proceedings should have been conducted to determine whether, in fact, Zale was appropriately in the joint-employer unit (assuming such a unit is appropriate at all) before unfair labor practice proceedings were commenced. For if Zale was in fact a "joint-employer", the Union demands, which omitted Zale, were unquestionably defective.

Indeed, the Board itself has recognized merit in the foregoing argument in a companion case to the instant one, involving the K-Mart store in San Fernando, California. On June 13, 1966, in case No. 31-RC-141 (159 NLRB No. 28), the Board directed an election of all regular full-time and part-time employees of K-Mart,

Mercury and Gallenkamp employed at K-Mart's San Fernando store. . . ." Later, on June 22, 1966, the Board was administratively advised that subsequent to the hearing in that case but prior to the Board's Direction, a new licensee, Holly Stores, Inc., had begun operating in the K-Mart store in San Fernando. The Board, on its own motion, issued an order amending the Direction of the Election so as to include "all regular full-time and part-time employees of Holly Stores, Inc.

Thereafter, on June 29, 1966, counsel for Holly Stores, Inc. filed with the Board an objection to the issuance of the Board's order of June 22, 1966, "Without notice, without a hearing and without affording Holly Stores, Inc. an opportunity to be heard with respect thereto." On July 7, 1966, the Board wired the parties that in light of the objection by Holly Stores, Inc., all ballots in the election of that day were to be impounded, pending Board consideration, in a formal hearing, of the question raised by this objection.

It is important to re-emphasize that in the instant case, there has never been any evidence that Zale is a successor of Besco, as there was never any evidence that Holly Stores, Inc. was a successor of anyone else. The recognition by the Board in case No. 31-RC-141 that a licensee may not summarily be included within a unit unless and until it has had the opportunity to be heard on pertinent questions pertains to the instant case in the same manner. The Board in the instant case did what, in case No. 31-RC-141, it was inadvertently about to do—put the cart before the horse.

2. **Assuming, Arguendo, That the Board's Certification Names an Appropriate Joint Employer Unit, the Union Has Failed to Adhere to That Certification in Making Its Demands Upon the Employer.**

K-Mart and the Licensees further charged that the Union's demand for recognition was improper because it requested K-Mart to bargain alone for all the joint-employers. This interpretation of the Union's demand was not accepted by the Board which concluded that the demand could only be construed as a request for bargaining on a joint-employer basis [Vol. I, p. 327]. The preponderance of record evidence is contrary to this conclusion.

On February 24, 1965, the Regional Director issued his Decision and Direction of Election [Vol. III, G.C. Ex. 5(a)] in which he ruled that K-Mart and each of its licensees were a joint-employer of the employees in each of their respective departments. The effect of this decision was to obligate K-Mart and the licensees to bargain collectively with the union as a single employer unit. Nevertheless, subsequent to the initial Certification of Representative [Vol. III, Ex. 40], and in complete contravention of the Regional Director's Decision and the certification of the Board, the Union on September 21, 1965, proceeded to make a demand on K-Mart and K-Mart *alone,* to bargain collectively, on behalf of all employers, with the union [Vol. III, G.C. Ex. 41(a)]. That the Union felt it had met the terms of the certification in making a solo demand upon K-Mart is evidenced by the remarks of the General Counsel during the instant hearing:

> "My contentions are that the Joint Employer, the *common denominator* K-Mart, which was found to be a Joint Employer with each one of the licensees, the Union by making the demand on K-Mart, *that demand alone would satisfy any requirement that the Union had under the certification to protect its rights. It would not have even had to make a demand on any of the licensees.* That would be my position, Your Honor." [Vol. II, Tr. p. 25, lines 15-24]. (Emphasis added).

The intention to have K-Mart bargain for all of the joint-employers is further made clear in a letter dated October 19, 1965, from counsel for the Union to counsel for K-Mart. This letter attempted to "clarify" the Union's position on this matter and to re-assert its request for bargaining. It stated in part:

> "So that there is no misunderstanding about the request made by the Union, this is to confirm the fact that the Union's request to bargain was a request upon your client (K-Mart) to bargain in the *unit found appropriate by the Board.*" [Vol. III, G.C. Ex. 48]. (Emphasis in original).

The quoted portions of this letter can only be understood to express the position that although the unit included K-Mart and all of its licensees, demand was made by the Union upon K-Mart alone to *bargain on behalf of the entire unit.* Indeed, this is precisely the General Counsel's theory, as expressed during this hearing and quoted above.

To add further complexity to an already confused situation, the Union, on October 18, 1965, a *period of more than five weeks after its initial demand upon K-*

Mart alone, directed *separate* demand letters to each of the licensees, including Besco (a second demand was *not* made upon K-Mart), requesting them to bargain with the Union?[1] [Vol. III, G.C. Exs. 42(a), 43(a), 44(a), 45(a), 46(a), 47(a)]. Surely, K-Mart and its Licensees were justified in refusing to acquiesce in the Union's separate demands made upon each licensee (but not K-Mart) to bargain with the Union.

It is submitted that the proper procedure for such a demand, consonant with the purposes of the Act and the

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[1]This letter of demand was not the first instance in which the Union chose to ignore the Board's certification and to treat K-Mart and its licensees as separate entities. At a time subsequent to the certification the Union filed an unfair labor practice charge involving the K-Mart Westminster store (case No. 21-CA-6854), which was part of the original proceeding, together with Commerce, in which, on records stipulation to be identical, the Regional Director ruled that a joint-employer status existed between K-Mart and its licensees [Vol. III, Mercury Ex. 1; Vol. II, p. 61, lines 16-20].

This charge was amended by the Union to *exclude* K-Mart and all other licensees, except Mercury Distributing Co. [Vol. III, Mercury Ex. 2; Vol. II, p. 61, line 21, to p. 62, line 1]. As a consequence of this charge the Union and Mercury executed a settlement agreement which K-Mart and one of the other licensees were not made parties [Vol. III, G.C. Ex. 2(c), Mercury Exs. 3, 4; Vol. II, p. 62, lines 2-13]. The execution of the settlement agreement in effect segregated the joint-employer relationship into an individual employee relationship by refusing to recognize the joint-employer unit for purposes of unfair labor practices. This episode makes it all the more clear that when the Union later made its demands separately upon the various licensees it was pursuing and extending its policy of segregating and fragmentizing the unit for purposes of collective bargaining. Board precedent is to the effect that a union cannot recognize a joint-employer unit for one purpose (*i.e.,* collective bargaining) and disregard it for another purpose (*i.e.,* unfair labor practice charges). *Dayton Coal & Iron Corp.,* 101 NLRB 672, 688-689 (1952); *Dearborne Oil & Gas Corp.,* 125 NLRB 645 (1959), dissent of member Jenkins); *Zayre Corporation,* 154 NLRB 1372 (1965); *Great Scott Super Market,* 156 NLRB 592 (1966); *Rose Printing Co.,* 146 NLRB 638 (1964).

intent of the certification, was a joint letter to all of the employers within the unit advising them that they constitute one unit and requesting them to bargain with the Union jointly. Instead, the Union chose to make a totally inappropriate request of K-Mart to separate itself from the joint-employer unit and to bargain alone on behalf of each of the employers within the unit. Such a request was improper, contrary to the certification, and provided ample justification for K-Mart's refusal to bargain.

The question of the Union's conformance with the Board's certification and the correct procedure instituting collective bargaining in a joint-employer unit is one of much substance. The impropriety of the initial certification is established by the weight of evidence; equally obvious is the fact that the Union has never made clear and unequivocal demand on the unit found appropriate by the Board. At the very least, K-Mart and its Licensees were entitled to an understandable and accurate request for bargaining before they were required to accede to such a demand.

B. Conclusion.

For the reasons above cited and the reasons raised and discussed in the briefs of other Petitioners in the consolidated cases it is respectfully submitted that enforcement of the Board's Order be denied.

Respectfully submitted,

HILL, FARRER & BURRILL,
By KYLE D. BROWN,
Attorneys for Petitioner Hollywood Hat Co.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

KYLE D. BROWN

APPENDIX A.

Statutes and Code Sections.

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

APPENDIX B.

(Pursuant to Rule 18(f) of the Rules of Court).

1. Representation Case Exhibits (21-RC-9128, et al.)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - 1(j)	6	7	7	
Employer's (K-Mart) Exhibits*				
1	70	70	71	
2	138	138	138 – 39	
3(a)	214	215	215	
3(b)	216	216	217	
3(c)	217	218	219	
3(d)	219	220	220	
3(e)	221	222	222	
3(f)	222	223	223	
3(g)	224			

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II-A.

2. Unfair Labor Practice Case Exhibits (Case No. 21-CA-6937)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - (j)	7	7	7	
2(a) - 49	18	18	19	
K-Mart Exhibits*				
1(a) - (d)	43 – 44	44	48	
1(e) - (d)	49	49	50	
2, 3	50 – 52	52		52
4	55	55	55	
5	56	56		57 – 58
Mercury Exhibits*				
1-4	61 – 62	62	63	

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II.

Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; and F & G MERCHANDISING;

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Brief of Petitioners Gallenkamp Stores Co., Mercury Distributing Company, Acme Quality Paints and F & G Merchandising in Support of Joint and Several Petition to Review and Set Aside an Order of the National Labor Relations Board.

PAUL, HASTINGS, JANOFSKY & WALKER,
By DENNIS H. VAUGHN,
CARL W. ROBERTSON,
510 South Spring Street,
Los Angeles, Calif. 90013,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Brief of Petitioners Gallenkamp Stores Co., Mercury Distributing Company, Acme Quality Paints and F & G Merchandising in Support of Joint and Several Petition to Review and Set Aside an Order of the National Labor Relations Board.

I.
JURISDICTIONAL STATEMENT.

This case is before this Court by way of three petitions filed respectively by GallenKamp Stores Co., Mercury Distributing Company, Acme Quality Paints, and F. & G. Merchandising (Docket No. 21,621) [hereinafter sometimes referred to collectively as "Licensee Petitioners"], K-Mart, a Division of S. S. Kresge Company (Docket No. 21,632) [hereinafter sometimes referred to as "K-Mart"], and Hollywood Hat Co. (Docket No. 21,649) [all said parties hereinafter sometimes referred to collectively as the "Petitioners"] to review and set aside a final Order of the National Labor Relations Board [hereinafter referred to as the "Board" or the "Respondent"] issued on December 30, 1966 in a case known on the records of the Board as "K-MART, A DIVISION OF S. S. KRESGE COMPANY; GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; F & G MERCHANDISING; HOLLYWOOD HAT CO.; and BESCO ENTERPRISES, INC. and RETAIL CLERKS UNION LOCAL NO. 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, CASE NO. 21-CA-6937." The proceedings are also before this Court by virtue of the Cross-Petition for Enforcement of said Order filed by the Board as to each of the said petitions. Retail Clerks Union Local No. 770, Retail Clerks International Association, AFL-CIO [hereinafter referred to as the "Union"], charging party below, on motion granted by the Court has intervened in these proceedings.

All Petitioners herein are engaged in business within the Ninth Judicial Circuit and the unfair labor practices alleged in the complaint upon which said final Order of the Board was entered allegedly occurred within this judicial circuit. As the Petitioners are aggrieved by said final Order of the Respondent and Cross-Petitioner herein, this Court has jurisdiction under Section 10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 29 U.S.C. §141 *et seq.* (1958)].

II.
STATEMENT OF FACTS.

1. K-Mart and Its Licensees.

The uncontradicted record evidence adduced at the hearing before the Board in the underlying representation case herein, case No. 21-RC-9309, established that K-Mart does not have the right to, and does not, exercise control over the wages, hours or working conditions of Licensee Petitioners' employees or the employees of the other licensees operating at K-Mart's Commerce store. Moreover, there is not a scintilla of evidence establishing joint control of labor relations by K-Mart and the licensees operating at the Commerce store.

Thus, Licensee Petitioners herein, and the other licensees doing business at the Commerce store, hire and discharge their own employees without the intervention or control of K-Mart (Vol. II(a), p. 46, lines 9-16). Indeed, K-Mart supervisors have no supervisory authority over the employees of the licensees (Vol. II(a), p. 45, lines 19-25). Each of the licensees employs, in addition to its departmental supervisors,

one or more supervisors referred to as "roving supervisors" who spend all or a considerable amount of their time managing and supervising the licensee's operations in the K-Mart Commerce store, other K-Mart stores, and indeed, in stores having no connection or relationship whatsoever with K-Mart (Vol. II(a), p. 56, line 21, to p. 58, line 13; p. 65, lines 1-25; p. 208, line 1, to p. 209, line 20; p. 300, lines 1-26). The licensees establish the wage rates for their own employees (Vol. II(a), p. 47, lines 11-13), and significantly, K-Mart is not even supplied with information concerning the wages paid by the licensees to their employees (Vol. II(a), p. 55, line 25, to p. 56, line 2). The licensees determine the work schedules for their employees (Vol. II(a), p. 47, lines 14-16; p. 53, lines 19-25). Employees of licensees do not receive the same fringe benefits provided by K-Mart to its employees (Vol. II(a), p. 51, line 24, to p. 53, line 25). Equally important, there is no interchange between employees of the licensees and K-Mart employees and neither performs the work of the other (Vol. II(a), p. 49, line 22, to p. 50, line 2). Furthermore, a number of the employees of the Licensee Petitioners herein are employed on frequent occasions by said licensees at locations other than the K-Mart Commerce store and, indeed, at locations totally independent of K-Mart (Vol. II(a), p. 50, line 3, to p. 51, line 16). With respect to the license agreements between K-Mart and the licensees, it is important to note that said license agreements negate the creation of any joint venture or partnership relationship. More importantly, the license agreements do not provide for the common handling of labor relations for the licensees' employees, and

nothing contained therein suggests that the parties contemplated such joint control or evidences any such intent (Vol. II(a), p. 71; Vol. III, Employer Ex. 1, Case No. 21-RC-9309).

There is no record evidence that K-Mart exercises control over the licensees' employees so as to affect their working conditions or tenure of employment. Nor is there any evidence that K-Mart has ever had any part in settling grievances of licensees' employees. The fact of the matter is, such limited control as K-Mart may exercise over the licensees' operations is only that necessary for efficient operation of the stores and to give the appearance to the public of an integrated retail operation. Indeed, the evidence is so conclusive that the licensees exclusively operate their own departments that it is no wonder that the Union willingly joined in a stipulation with Petitioners that "none of these concessions are owned or operated by K-Mart" (Vol. II(a), p. 89, lines 5-14).

2. F & G Merchandising.

F & G Merchandising [hereinafter sometimes referred to as "F & G"] is a licensee operating an automotive service center which, unlike the other licensee departments, is located in a room separate and apart from the rest of K-Mart's Commerce store (Vol. II (a), p. 58, line 14, to p. 60, line 20).

F & G employs approximately five or six employees at the K-Mart Commerce store, most of whom are experienced, trained mechanics. These mechanics perform automotive work, such as front end work, wheel balancing, brake work, safety checks, fixing flat tires, replacing mufflers, and installing automobile acces-

sories (Vol. II(a), p. 58, line 14, to p. 59, line 18; p. 60, lines 5-18; p. 68, lines 10-16).

As is the case with the other licensees at K-Mart's Commerce store, F & G determines all matters with respect to wages, hours and working conditions for its automotive service center employees, without the intervention or control of K-Mart (Vol. II(a), p. 67, line 20, to p. 68, line 6). F & G hires and fires its own employees (Vol. II(a), p. 68, lines 7-9), and it determines the work schedules of its employees who often work different hours than those worked by other store employees (Vol. II(a), p. 60, line 24, to p. 61, line 7). F & G employees are not supervised by K-Mart supervisors, and there is no interchange between F & G's employees and K-Mart's employees (Vol. II(a), p. 49, line 22, to p. 50, line 2; p. 60, lines 2-4). In addition, its mechanics wear different uniforms than other store employees and have different restroom facilities from all other employees at the K-Mart store (Vol. II(a), p. 60, line 21, to p. 61, line 9).

There are other substantial factors distinguishing F & G operations from those of K-Mart and/or the other licensees doing business at the K-Mart Commerce store. Thus, F & G purchases its own merchandise, and any complaints concerning its services are made directly at its automotive service center (Vol. II(a), p. 59, line 24, to p. 60, line 1; p. 197, line 25, to p. 198, line 1). Unlike the rest of the store operations, services performed by F & G are paid for at the automotive center, and F & G maintains a separate office at the K-Mart Commerce store, apart from those offices maintained by K-Mart and the other licensees (Vol. II(a), p. 59, lines 19-23; p. 61, lines

10-22). Also unlike other licensees, F & G does not participate in joint advertising but conducts its own advertising without any control by K-Mart (Vol. II (a), p. 195, lines 2-13).

Significantly, the mechanics and others working on automobiles in the F & G department are experienced and skilled in the area of automobile maintenance, and are not merely unskilled sales personnel as are found in the other departments at the K-Mart Commerce store (Vol. II(a), p. 298, lines 11-25). As a consequence, one would expect, and the fact of the matter is, that the employees of F & G receive remuneration different from that received by the employees of the other licensees and K-Mart, the employees of F & G receiving commissions or bonuses not enjoyed by said other employees (Vol. II(a), p. 61, line 23, to p. 62, line 17).

3. The Challenged Ballot Cast by Employee Pentecost.

In the election held at the Commerce store on April 7, 1965 the vote cast by employee Pentecost, an employee of F & G Merchandising, was challenged by the Union on the alleged ground that Pentecost was a supervisor.[1]

With respect to this matter, Mr. Richard Wall, Manager of the F & G department at K-Mart's store in

[1]The Union's challenge to Pentecost's ballot was based only upon the alleged ground that he was a supervisor within the meaning of the Act, as amended (Vol. III, G. C. Ex. 12). F & G denied that Pentecost was a supervisor and a statement in support of this position was submitted to the 21st Region of the Board by letter dated May 3, 1965 (Vol. III, G. C. Ex. 22). Apparently, the Regional Director regarded the Union's contention in this regard as being wholly without merit, since the matter is not even discussed in the Regional Director's Supplemental Decision and Direction (Vol. III, G. C. Ex. 28(a)).

Commerce and Pentecost's supervisor at the time of the election, would have testified as to the following facts:[2]

Pentecost was hired by F & G on or about February 1, 1965. Prior thereto, on or about January 6, Wall was hired to become the manager of F & G's department at the Commerce store, a position which was to become open in the near future. Pending such opening, Wall was classified as a Manager-Trainee, and was trained by the manager of the F & G department at K-Mart's Costa Mesa store. It was also understood that Wall would be sent to F & G's main offices in Houston, Texas for a training period prior to taking over as manager of the Commerce store (Vol. III, G. C. Ex. 31, Ex. "A", p. 1).

With respect to Pentecost, Wall's affidavit states:

> "I knew Pentecost before starting to work at Commerce because I had worked with him at Scoa in Los Angeles for about a year in 1963. I liked Pentecost's work as a mechanic. After I was hired by F & G, I contacted Pentecost toward the end of January. I told him I was going to be manager in the Commerce store and I wanted him to work for me. He agreed. I told Pentecost it would be a couple of weeks before I would be taking over the Commerce store. I thought it would be a good idea for Pentecost to learn some of the procedures prior to coming into the Commerce store. I spoke to Bill Boyce [manager of the Costa Mesa store]

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[2]Wall would have testified at the trial herein, had he been permitted to do so, in accordance with his affidavit attached as Exhibit "A" to General Counsel's Exhibit 31 (Vol. II, p. 40, line 11, to p. 41, line 13). The Trial Examiner, however, improperly refused to permit his testimony (Vol. II, p. 37, line 19, to p. 40, line 5).

> and I suggested that we train Dick [Pentecost] in Costa Mesa along with me so that he might familiarize himself with Company policies. Boyce agreed to put him on. I contacted Pentecost and told him of the arrangement. I told him that while I was gone to Texas he would be training in the Costa Mesa store under Bill Boyce's mechanic. I told him that when I got back, he would come into the Commerce store with me. I told him I believed I would be gone about two weeks. I was in fact gone ten days. Pentecost agreed to this arrangement only on my assurance that this was temporary pending my return from Texas." (Vol. III, G. C. Ex. 31, Ex. "A", pp. 2-3).[3]

Wall went to Houston for his training period on February 7. He returned from Houston on February 17 and took over management of the Commerce store on February 18. Pentecost's last day of work at Costa Mesa was February 17, his regular day off was February 18, and he reported at the Commerce store on February 19. Pentecost worked at Commerce at all times thereafter to and including April 7, the date of the election herein (Vol. III, G. C. Ex. 31, Ex. "A", pp. 1, 3).

The wages paid to Pentecost during his training period at Costa Mesa from February 1 through Feb-

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[3]The statement in the Regional Director's Supplemental Decision and Direction (G. C. Ex. 28(a)) that Pentecost was hired "by the F & G manager at the K-Mart Costa Mesa store" is contrary to the facts set forth in Wall's affidavit. The above-quoted statements from said affidavit clearly disclose that it was Wall, and not the manager at Costa Mesa, who hired Pentecost. The manager of the Costa Mesa store merely agreed to Wall's suggestion that Pentecost be trained at Cosa Mesa.

ruary 17 were charged to the Commerce store.[4] Wall was informed that this would be the case by the manager of the Costa Mesa store (Vol. III, G. C. Ex. 31, Ex. "A", pp. 3-4). This fact is further evidenced by F & G's general journal entry which states "To transfer wages of W. R. Pentecost earned in 1st quarter. He was only training at #43 [Costa Mesa] for position at #64 [Commerce]." (Vol. III, G. C. Ex. 27; Vol. III, G. C. Ex. 31, Ex. B).

The procedures adopted in Pentecost's case were completely in accordance with F & G's standard procedures since it is common practice for new employees to be trained at locations other than the ones for which they are hired, and, in all such cases, the salary paid during the training period is charged to the location for which the new employee is hired. Indeed, the exact same procedure was followed in Wall's case since his salary during the entire period prior to his taking over as manager on February 18 was charged to the Commerce store (Vol. III, G. C. Ex. 31, Ex. "A").

The foregoing is the only record evidence herein concerning the facts relevant to a determination of the challenge to Pentecost's vote.

The original Decision and Direction of Elections herein (Vol. III, G. C. Ex. 5(a)) provided:

> "Eligible to vote are those in the units who were employed during the payroll period immediately preceding the date below. . . ." (*Id.* at p. 8).

The "date below" was the date of issuance of the Decision, February 24, 1965. The payroll period imme-

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[4]The Supplemental Decision and Direction (G. C. Ex. 28(a)) refers apparently inadvertently to Wall's wages at Costa Mesa, rather than Pentecost's, being charged to Commerce.

diately preceding February 24 was in fact the payroll period ending February 24, during which payroll period Pentecost was concededly both on the payroll and physically present performing his duties at the Commerce store.

Despite the foregoing, however, in his Supplemental Decision and Direction (Vol. III, G. C. Ex. 28(a)), the Regional Director mistakenly and erroneously designated the payroll period ending February 17 as the appropriate payroll period. (*Id.* at p. 3).

Then following the election—and to further compound error—the Regional Director sustained the Union's challenge to Pentecost's ballot, thereby resulting in Pentecost's disenfranchisement and an election victory for the Union by a margin of only one vote—38 to 37! Had the Regional Director properly overruled the Union's challenge to Pentecost's ballot as the facts and law required, the election could have resulted in a tie vote—38 to 38—in which case, of course, the Union would have lost the election.

In addition to the foregoing facts, Licensee Petitioners hereby join in, adopt and incorporate by reference the statement of facts contained in the Brief filed by K-Mart herein.

III.
SPECIFICATION OF ERROR.

The Licensee Petitioners specify herein only those errors which are the subject matter of the argument hereinafter presented. Those errors are as follows:

1. The Respondent's conclusion and holding that Licensee Petitioners herein and K-Mart are common or "joint" employers is clearly erroneous in that it is not

supported by substantial evidence on the record considered as a whole and is contrary to law.

2. The Respondent's conclusion and holding that the employees of Petitioner F & G were included in an overall unit is clearly erroneous in that it is not supported by substantial evidence on the record considered as a whole and is contrary to law.

3. The Respondent's conclusion and holding that F & G employee Pentecost was ineligible to vote in the election herein is clearly erroneous in that it is not supported by substantial evidence on the record considered as a whole and is contrary to law.

In addition to the foregoing specifications of error, Licensee Petitioners also rely upon the remaining errors alleged in their "Points Upon Which Petitioners Rely" on file herein, and with respect thereto, Licensee Petitioners hereby join in, adopt and incorporate by reference the arguments contained in the Brief filed by K-Mart herein.

IV.
QUESTIONS PRESENTED.

The questions presented by the specifications of error herein are:

1. Whether the Petitioners are common or "joint" employers of each other's employees;

2. Whether an overall unit at the K-Mart store herein is inappropriate because, among other reasons, F & G employees present a homogenous, identifiable and distinct group and lack a sufficient community of interest with other employees to warrant their inclusion in said unit; and

3. Whether the challenge to the ballot of employee Pentecost was improperly sustained, said ballot being sufficient to affect the results of the election herein.

V.
SUMMARY OF ARGUMENT.

A. The Board's Conclusion and Holding That Petitioners Herein Are Common or Joint Employers Is Not Supported by Substantial Evidence on the Record Considered as a Whole and Is Contrary to Law.

The uncontradicted record evidence herein demonstrates that in the day-to-day operations of the K-Mart store K-Mart does not control the conditions of employment relating to the employees of the licensees or the labor relations policies of the licensees. Equally important, neither the license agreement nor the rules and regulations promulgated by K-Mart permit K-Mart to interfere with or exercise control over the labor relations policies applied by the licensees to their employees. Indeed, the license agreements by their express terms, and the conduct of K-Mart and its licensees under their license agreements negates the conclusion reached by the Board herein. At the time of the Regional Director's original Decision and Direction of Elections herein, then current Board authority required a finding that K-Mart and its licensees were not joint employers. Thus, the Regional Director's conclusion and holding to the contrary, which the Board summarily adopted, is not supported by substantial evidence on the record considered as a whole and is contrary to law.

A review of Board precedent dealing with the issue of appropriate units in the retail and discount indus-

try demonstrates that its decision herein is based upon factors that are contrary to the purposes, policies and provisions of the Act. Moreover, the Decision and Order herein will operate to the prejudice of the licensees doing business in K-Mart's Commerce store and will not produce sound, stable collective bargaining relationships.

B. An Overall Unit at K-Mart's Commerce Store Is Inappropriate Because, Among Other Reasons, F & G Employees Represent a Homogenous, Identifiable and Distinct Group and Lack a Sufficient Community of Interest With Other Employees to Warrant Their Inclusion.

The uncontradicted record evidence herein establishes that the employees of F & G represent a homogenous, identifiable and distinct group which lacks a sufficient community of interest with the other employees herein to warrant their inclusion in the overall unit found appropriate by the Board. The Board's conclusion to the contrary is supported neither by fact nor law. Accordingly, as an overall unit is clearly not appropriate —and this is the unit in which the refusal to bargain is alleged to have occurred—none of the Petitioners can be found to have violated Section 8(a)(5) of the Act, as alleged.

C. The Board Improperly Sustained the Union's Challenge to the Ballot of Employee Pentecost, Said Ballot Being Sufficient to Affect the Results of the Election Herein.

Employee Pentecost was concededly both on the payroll and physically present performing his duty at the Commerce store a full five days before February 24, 1965, the eligibility cut off date established in the orig-

inal Decision and Direction of Elections herein. For this reason alone, Pentecost's vote should have been counted.

Despite the foregoing, however, in his Supplemental Decision and Direction herein, the Regional Director mistakenly and erroneously designated the payroll period ending February 17 as the appropriate payroll period. Nevertheless, it is uncontradicted that Pentecost (1) was hired by F & G for employment in the Commerce store two and one-half weeks prior to February 17—the revised eligibility date; (2) his assignment to the Costa Mesa store was temporary and for training purposes only; and (3) his salary while in training at Costa Mesa was charged to the Commerce store. Therefore, under well-established Board authority, Pentecost was clearly eligible to vote in the election herein. Since the Union won the election by a margin of only one vote, Pentecost's ballot was sufficient to affect the result of the election herein. Accordingly, since there can be no violation of Section 8(a)(5) of the Act in a case where the Board has improperly sustained challenges to ballots sufficient in number to affect the results of the election, there was no violation in this case.

VI.
ARGUMENT.

A. The Respondent's Conclusion and Holding That Petitioners Herein Are Common or "Joint" Employers Is Not Supported by Substantial Evidence on the Record Considered as a Whole and Is Contrary to Law.

1. The Regional Director's Decision and Direction of Elections Herein Is Contrary to Fact and Law.

Of controlling significance is the fact that the uncontradicted record evidence herein demonstrates that in the day-to-day operations of K-Mart's store, K-Mart does not control the conditions of employment relating to the employees of the licensees or the labor relations policies of the licensees. Yet, the Regional Director in his original Decision and Direction of Elections (Vol. III, G. C. Ex. 5(a)) chose to ignore completely this record evidence and, without analysis, concluded that K-Mart and each of its licensees were common or joint employers of the employees in each of the respective licensee departments. Rather than considering the comprehensive record evidence before him the Regional Director based his decision upon (1) his prior decision in 1963 in case No. 21-RC-8194 (unreported) involving K-Mart operations, and (2) his erroneous interpretation of the license agreements between K-Mart and its licensees.

Reliance upon the prior decision in 1963 was completely misplaced for several reasons. First, there was no showing at the hearing held in the instant case in January 1965 that the conditions then existing at K-Mart's Commerce store involving all of the licenses

were identical to the conditions existing approximately two years earlier at the time of the prior decision which concerned both K-Mart's Commerce and San Fernando stores and only certain of the licensees herein.[5] Second, the Regional Director relied upon a line of authority, which had served as the basis for his prior decision, which no longer represented viable Board precedent at the time of the instant decision. Thus, the Regional Director's decisions in both the prior and instant cases were based upon *Spartan Department Stores,* 140 NLRB 608 (1963); and *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962).[6] But clearly, at the time of his Decision and Direction of Elections herein, those decisions had been severely limited—indeed, overruled by implication—by then current Board authority. See, *e.g., S.A.G.E., Inc. of Houston,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964); and *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964).[7]

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[5]Indeed, the only record evidence in point indicates that the operations of the K-Mart store have changed substantially in the interim period (Vol. II(a), p. 194, lines 2-5).

[6]While *United Stores of America,* 138 NLRB 383 (1962) was cited in the Regional Director's prior decision in 1963, it was not cited in the original Decision and Direction of Elections herein.

[7]Whether the facts are viewed from the vantage point of 1963 or at the time of the Regional Director's original Decision and Direction of Elections herein, reliance on the decisions cited by the Regional Director was completely misplaced. The fact of the matter is that all licensors involved in the cases cited maintained substantial control over the conditions of employment and labor relations relating to the employees of their licensees. And, indeed, it was on that basis that the decisions in *Spartan, Frostco* and *United Stores* had been distinguished by Board authority then current at the time of the Regional Director's Decision and Direction of Elections herein. *Spartan Department Stores, Inc., supra,* is illustrative. There, the facts demonstrated that the licensor had authority to adjust any labor dispute involving a licensee department and could require licensees to comply with

Moreover, contrary to the Regional Director's conclusion, the license agreements between K-Mart and its licensees do not create a joint-employer relationship. Nor do the license agreements grant to K-Mart control over the conditions of employment and labor relations relating to the employees of its licensees. To the contrary, the license agreement itself negates any such conclusion. Thus, for example, each owner of a department in the K-Mart store is required to "pay all taxes levied on its . . . payrolls", and it is the responsibility of each owner/operator of a department to comply with all local, state and federal laws, such as workmen's compensation, occupational and non-occupational disability laws, and any other statutory requirements with respect to health and welfare benefits for its employees (Vol. III, G. C. Ex. 6, App. A, p. 3). The license agreement also expressly provides that "neither party to this Agreement shall act as the agent, servant or employer of the other party" and that "the parties do not intend this Agreement to constitute a joint venture, partnership or lease and nothing herein shall be construed to create such a relationship" (Vol. III, G. C. Ex. 6, App. "A", p. 8).

While the Regional Director apparently placed great emphasis upon the fact that the license agreement requires the licensees to comply with certain rules and

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terms of employment, hours, vacation policy, collective bargaining, and union affiliation as established by the licensor. Similarly, the facts in *United Stores of America,* and *Frostco, supra,* support a finding that the licensor controlled the working conditions or labor relations relating to the employees of its licensees.

regulations promulgated by K-Mart, he completely ignored the fact that the agreement permits *only* such rules and regulations which are "consistent with this License Agreement" and further only rules and regulations which are necessary and proper for the success and conduct of the business of the licensor and licensees at the K-Mart store (Vol. III, G. C. Ex. 6, App. A, pp. 1 and 4). The license agreement does not permit K-Mart to interfere with or exercise control over the labor relations policies applied by the licensees to their employees.[8]

Furthermore, and most important, the uncontradicted record evidence herein demonstrates that in day-to-day operations, K-Mart has not in fact interfered with or attempted to control the conditions of employment or labor relations relating to the employees of its licensees. In short, the conduct of K-Mart and its licensees *under* their license agreement negates the conclusion reached by the Regional Director herein.

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[8]Indeed, it is patently clear that under Board authority the license agreement and the rules and regulations promulgated by K-Mart do not constitute evidence from which an inference of a joint-employer relationship can be drawn. That fact is beyond controversy since a comparison of the license agreement and the rules and regulations herein with the license agreement and rules and regulations before the Board in its White Front Store decisions demonstrates that White Front exercised substantially greater control over its licensees than K-Mart does, and there the Board held that White Front and its licensees *were not* joint employers. See *Bab-Rand Co.*, 147 NLRB 247 (1964); *Esgro Anaheim, Inc.*, 150 NLRB 401 (1964); and *Triumph Sales Inc.*, 154 NLRB 916 (1965); Vol. III, G. C. Ex. 6, pp. 21, 22 (White Front License Agreement); and G. C. Ex. 6, App. "C" (White Front Rules and Regulations).

2. **A Review of Board Precedent Dealing With the Issue of Appropriate Units in the Retail and Discount Industry Demonstrates That Its Decision Herein Is Based Upon Factors That Are Contrary to the Purposes, Policies and Provisions of the Act.**

Prior to the appearance of retail and discount stores such as K-Mart, and its competitors such as White Front, the Board was confronted with appropriate unit questions in situations where two or more employers did business at the same location under lease or license agreements. Without exception, the Board held that the *only* standard upon which a joint-employer relationship could be predicated was a finding that the licensor or lessor maintained substantial control over the conditions of employment and labor relation policies relating to the employees of its licensees or lessees. See *e.g., Atlantic Mills Servicing Corp.,* 117 NLRB 65 (1957); *Fair Department Store,* 107 NLRB 1501 (1954); *Erlanger Dry Goods Co.,* 107 NLRB 23 (1953); *Alms & Doebke Co.,* 99 NLRB No. 132, 31 LRRM 1151 (1952); *Sperry & Hutchison Co.,* 117 NLRB 1762 (1957); *Duanes Miami Corporation,* 119 NLRB 1331 (1958); *The Darling Utah Corp.,* 85 NLRB 614 (1949); *Block & Kuhl Dept. Store,* 83 NLRB 418 (1949); *J. M. High Co.,* 78 NLRB 876 (1948). Thus, the Board did not consider that the facts that (1) licensees operated at the same location owned by the licensor, or (2) uniform methods of advertising and dealing with the public were established, or (3) the entire operation appeared to be an integrated operation, or (4) the licensor retained certain limited control for overall efficient operation of the complex, were legally sufficient to establish the various employers as joint

employers. (*Id.*) Where the requisite joint control over the conditions of employment and labor relations policies relating to the employees of licensees or lessees was absent, the Board refused to find that a joint-employer relationship existed. (*Id.*)

Nevertheless, with the appearance of retail and discount enterprises, such as K-Mart, Board law as it developed during the early 1960's, appeared to waiver from the long-standing policy that had been developed on the joint-employer issue in other contexts. Thus, the Board appeared to be placing greater emphasis on the *appearance* of a unified or integrated operation. Without explaining why or in what manner the appearance to the public of an integrated retail operation had any relevance to a joint-employer issue, the Board by way of *dictum* emphasized that factor, and appeared to minimize the factor of control by the licensors or lessors over the conditions of employment and labor relations relating to the employees of their licensees or lessees. See *Bargain City USA, Inc.*, 131 NLRB 803 (1961); *Frostco Super Save Stores, Inc.*, 138 NLRB 125 (1962); *United Stores of America,* 138 NLRB 383 (1962); *Spartan Department Stores,* 140 NLRB 608 (1963).[9]

However, beginning in 1964, in a series of well-reasoned and articulate decisions, the Board made it abundantly clear that the standard previously enunciated in numerous old joint-employer cases was equally

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[9]In each of these cases the licensor involved maintained substantial control over the conditions of employment and labor relations relating to the employees of their licensees. (See Footnote 7, *supra*) Therefore, the Board's emphasis upon the appearance of a unified or integrated operation in these decisions is clearly *dictum.*

applicable in cases involving retail and discount enterprises, such as K-Mart, namely, that there can be no joint-employer relationship *unless* there is a finding, supported by the record, that the licensor or lessor maintains substantial control over the conditions of employment and labor relations relating to the employees of its licensees or lessees. See, *e.g., S.A.G.E., Inc. of Houston,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964); *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *New Fashion Cleaners, Inc.,* 152 NLRB 284 (1965); *Triumph Sales, Inc.,* 154 NLRB 916 (1965); *Grand Central Liquors,* 155 NLRB 295 (1965).

That was the status of Board policy at the time of the Regional Director's decision herein. Nevertheless, the Regional Director herein refused to apply this fundamental Board policy, only to be followed inexplicably by the Board then ignoring the Regional Director's action by summarily denying Petitioners' requests for review. Thus, without discussion, the decision in the instant case marked still another reversal in Board policy. With this decision, it is patently clear that the Board has adopted a policy of finding a joint-employer relationship solely on the basis of "appearance", namely, the appearance of a unified or integrated operation, without regard to the factor of control over working conditions or labor relations.

Indeed, if there was any doubt in this regard, such doubt was laid to rest by the Board's decisions subsequent to the instant case, and most particularly *Thriftown, Inc.,* 161 NLRB No. 42, 63 LRRM 1298 (1966). There, the Board, overruling its Regional Di-

rector, found a joint-employer relationship even though there was not one whit of evidence establishing that the licensor exercised any control whatsoever over the conditions of employment and labor relations relating to the employees of its licensees; in fact, the contrary was conceded by all parties. The fact is that the *Thriftown* decision is more than a mere reversion by the Board to its initial decisions dealing with retail and discount complexes wherein *undue weight* was given to the fact that the licensor and its licensees operated under the same roof. Now, as *Thriftown* makes abundantly clear, a finding of a joint-employer relationship is *mandatory* under Board policy any time two or more employers are operating at the same location in such a manner as to give the appearance to the public of an integrated retail operation. This change in Board policy was the subject of a stinging dissent in the *Thriftown* decision:

> "In the case now before us, the operating agreement not only specifically states that 'nothing in this agreement shall in any way be construed to constitute a co-partnership or joint venture between the parties hereto'; it also specifically provides that Astra [the licensee], without the participation of Thriftown [the licensor], will hire, fire, and discipline its own employees, determine their wages, rate of pay, and other benefits, and establish its own deductions for taxes, social security, and related items. These provisions are clearly at odds with a contractual intent on the part of Thriftown and Astra to create a joint-employer relationship. Nor are there in this record other facts from which such an intent may reasonably

be inferred. *We look in vain in our colleagues' opinion for evidence that Thriftown has actually controlled Astra's labor policies . . . The conformity requirements are quite clearly aimed at fostering the public appearance of a single integrated enterprise.* They have nothing to do with the employment relationship as such." [Emphasis added.]

The criticism of the Board's decision in *Thriftown* by its dissenting members may be accurately summarized by stating that Board policy is now based on irrelevancies rather than the appropriate economic or statutory considerations properly underlying unit determinations for collective bargaining. Frankly, there is but one explanation for the Board's startling and unprecedented decision in the instant case and in similar recent cases. The Board, quite simply, has abandoned all reason and logic and has substituted in its stead *as a controlling factor*—contrary to the dictates of Section 9(c)(5) of the Act—the extent of the union's organizational efforts. That conclusion can hardly be called an assumption for in the instant case, and in every case decided since this case, the Board's ultimate decision on the joint-employer question has been in accord with the unit sought by the union in its petition.[10]

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[10]In *K-Mart (San Fernando)*, 159 NLRB No. 28, 62 LRRM 1248 (1966); *K-Mart (Jackson)*, 161 NLRB No. 92, 63 LRRM 1385 (1966); *K-Mart (Commerce)*, 162 NLRB No. 41, 64 LRRM 1045 (1966); *Jewel Tea Co.*, 162 NLRB No. 44, 64 LRRM 1054 (1966); and *Thriftown, Inc.*, 161 NLRB No. 42, 63 LRRM 1298 (1966), the Board granted union requests for an overall joint-employer unit, summarily disregarding the employer requests for less than store-wide units. Most revealing is the Board's decision in *Bargain Town USA of Puerto Rico*, 162 NLRB No. 94, 64 LRRM 1160 (1967). There, the union petitioned for the employees of the lessor, and sought to exclude the employees of the lessees. In accordance with the union's unit request, the Re-

3. The Decision and Order Herein Will Operate to the Prejudice of the Licensees Doing Business in K-Mart's Commerce Store and Will Not Produce Sound, Stable Collective Bargaining Relationships.

Legal analysis aside, the most pernicious aspect of the Decision and Order of the Board herein is the prejudicial effect it will have upon the licensees doing business in K-Mart operations. An order requiring the licensees to bargain along with K-Mart collectively with the Union would have the effect of rewriting the license agreements the licensees bargained for and obtained from K-Mart, and equally important, it would have a like effect in changing the relationship of the licensees *inter se.*

Each of the Licensee Petitioners is an independent business organization of substantial size with its own separate and independent labor relations policies national in scope.[11] As independent business organizations, obviously none of these companies want to have their labor relations policies controlled by K-Mart. They did not bargain for, and do not want, the labor relations policies of K-Mart substituted for their own. Similarly, the licensees did not bargain for, and certainly do not want, K-Mart dictating the wages and fringe benefits they must pay to their employees, or the terms and

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gional Director held that the employees of lessees must be excluded on the ground that a joint-employer relationship did not exist. The Board, however, held that it was unnecessary to decide whether or not the lessor and its lessees were joint employers and excluded the employees of the lessees, in accordance with the union's desire.

[11]Thus, GallenKamp Stores Co. and Mercury Distributing Company are divisions of Shoe Corporation of America; F & G Merchandising, while principally based in Texas, is a subsidiary of the U.S. Rubber Company; and Acme Quality Paints, Inc. is a subsidiary of the Sherwin-Williams Company.

conditions upon which they hire, discharge or otherwise discipline their employees.

Furthermore, none of the licensees bargained for, and none of them want, joint liability with either K-Mart or other licensees doing business at K-Mart operations. For example, a licensee could be held responsible for unfair labor practices committed by its so-called fellow joint employers notwithstanding the fact that the licensee obviously could do nothing to control the conduct or prevent the unfair labor practice for which it would be held responsible.

Equally important is the salient fact that the Board's decision herein will not produce sound, stable collective bargaining relationships. To the contrary, the Board's decision will produce unstable, chaotic collective bargaining, thereby frustrating the fundamental purpose of the Act. That conclusion of necessity follows from the fact that the essential fact predicate underlying the Board's decision, namely, that K-Mart controls, or has the right to control, the wages, hours or working conditions and labor relations policies of its licensees is absent. In the absence of such control, the obstacles to sound, stable collective bargaining are many. Thus, while the Board presumably would have K-Mart dictate the terms upon which the licensees bargain, K-Mart, nevertheless, has no authority to do so. Therefore, unanswered are the questions of who, among the numerous employers herein, is to control the bargaining; who is to decide the numerous issues presented during bargaining; and, most significant, what happens when K-Mart or one or more of its licensees cannot or will not agree among themselves?

We submit that the only standard upon which a joint-employer relationship can be found, whether it be in the retail or discount store context, or any other context, is where the record evidence fully and amply supports a finding that the licensor exercises substantial control over the employment relationship between its licensees and its licensees' employees. Obviously, where the requisite joint control is absent, a finding—as was made in the instant case—that a joint-employer relationship exists would be ludicrous and, more importantly, prejudicial to all concerned.

B. An Overall Unit at K-Mart's Commerce Store Is Inappropriate Because, Among Other Reasons, F & G Employees Represent a Homogenous, Identifiable and Distinct Group and Lack a Sufficient Community of Interest With Other Employees to Warrant Their Inclusion.

The uncontradicted record evidence herein establishes that the duties of the employees of F & G are totally unrelated to and different from those of the garden-variety sales personnel found in other departments in the K-Mart's Commerce store. The evidence also reveals that the F & G employees are separately supervised, have different wages, hours and working conditions, work in a separate area and have separate facilities, and are treated independently of the other K-Mart and licensee operations. In short, the employees of F & G represent a homogenous, identifiable and distinct group which lacks a sufficient community of interest with the other employees herein to warrant their inclusion in the overall unit found appropriate by the Board. We submit that the Board's conclusion to the contrary is supported neither by fact or law.

The Board has consistently held that units consisting of employees of an automotive service department constitute an appropriate unit separate and apart from all other store employees. See, *e.g., Montgomery Ward and Company,* 150 NLRB 598 (1964); *J. C. Penney Co.,* 151 NLRB 53 (1965); *G. Fox & Co., Inc.,* 155 NLRB 1080 (1965); *Sears, Roebuck & Co.,* 160 NLRB No. 118, 63 LRRM 1141 (1966).

In *Montgomery Ward, Inc., supra,* the Board held that the employees of an automotive service department, including mechanics, gas island attendants, seat cover installers, stockmen and tire mounters constituted an appropriate unit separate and apart from all other store employees. In so holding, the Board noted that while a store-wide unit is presumptively appropriate, the service department employees exercise different skills, have separate supervision, work in a different area, and wear uniforms which set them apart from the other employees in the other departments of the store. Further, the Board noted that there was no interchange among such employees and other store employees.

All of those factors are equally true in the instant case; indeed, we submit that the facts herein present an *a fortiori* case for exclusion of the automotive service employees employed by F & G. Thus, unlike *Montgomery Ward,* wherein the automotive service department employees were employed by the same employer as the other store employees, and enjoyed the same wages, hours and working conditions, here, F & G's employees are employed by a separate and independent employer and enjoy different and separately determined wages, hours and working conditions.

In the *Montgomery Ward* case, the Board also distinguished a prior case involving the same employer, *Montgomery Ward and Company, Inc.,* 78 NLRB 1070 (1948), upon the ground that, unlike the earlier case, in the case before it there was a nucleus of craft employees—the mechanics. Additionally, the Board also noted that the record showed an absence of any close relationship between the work of the requested employees and the other groups of employees employed by the employer. *Montgomery Ward and Company,* 150 NLRB 598, 601 n. 11 (1964). Similarly, the record herein establishes that there is a nucleus of craft employees—the mechanics—and here also there is an absence of any close relationship between the work of F & G's employees and the employees employed by K-Mart and its other licensees. Equally significant is that in the instant case the wages, hours, and working conditions, and all other factors which the Board considers relevant, are separate and distinct as between F & G employees and the other employees in the K-Mart store.

The *Montgomery Ward* decision, 150 NLRB 598 (1964), has been reaffirmed in several recent Board decisions involving facts substantially identical to those presented in the instant case. See *J. C. Penney Company,* 151 NLRB 53 (1965); *Bamberger's Paramus,* 151 NLRB 748 (1965); *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *Triumph Sales, Inc.,* 154 NLRB 916 (1965); *G. Fox & Co., Inc.,* 155 NLRB 1080 (1965); *Sears, Roebuck & Company,* 160 NLRB No. 118, 63 LRRM 1141 (1966).

For example, in *J. C. Penney Co., supra,* the Board specifically held that an automotive repair department annexed to a retail store was not appropriately a part

of an overall store-wide unit. There, the automotive department employees performed the same work that the various skilled employees in the instant case perform in F & G's operation. Citing as authority its recent *Montgomery Ward* case, the Board then stated:

> "[T]he automotive repair employees are a homogenous and identifiable grouping, departmental in character and sufficiently distinct from the other departments in the store to warrant their separate representation." *J. C. Penney Co., supra,* at 56.

The Board also relied upon its *Montgomery Ward* decision in *Bamberger's Paramus, supra,* in excluding auto service employees, who exercised different skills, performed different functions, worked in a different building, wore different uniforms and had limited interchange with the other store employees. Here, all those facts are present, and significantly, the uncontradicted record evidence establishes that there is *no* interchange between the F & G employees and the other employees of K-Mart and its licensees at the Commerce store. See also, *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *Triumph Sales, Inc.,* 154 NLRB 916 (1965).

Since, in the language of the *Montgomery Ward* decision, F & G's automotive service center is "sufficiently identifiable, and distinct from the other departments," F & G was erroneously included in the unit herein. Accordingly, as an overall store unit is clearly not appropriate—and this is the unit in which the refusal to bargain is alleged to have occurred—none of the Petitioners herein can be found to have violated Section 8(a)(5) of the Act as alleged. *E.g., Deaton Truck Lines,* 143 NLRB 1372 (1963).

C. The Respondent Improperly Sustained the Union's Challenge to the Ballot of Employee Pentecost, Said Ballot Being Sufficient to Affect the Results of the Election Herein.

In brief, the facts with respect to the employment of employee Pentecost may be accurately summarized as follows: Pentecost was employed by F & G on February, 1, 1965 to work as a mechanic in the F & G department in K-Mart's Commerce store, the voting unit herein; he was first assigned to work at the F & G department in K-Mart's Costa Mesa store on a temporary basis for training purposes only; the wages paid to him while training at the Costa Mesa store were charged to the Commerce store; he physically reported at the Commerce store on February 19, 1965; and he worked at the Commerce store at all times thereafter to and including April 7, 1965, the date of the election.

On these facts, the Regional Director erroneously held that Pentecost was ineligible to vote in the election and sustained the Union's challenge to his ballot. We submit that the Regional Director's disenfranchisement of employee Pentecost was contrary to fact and law, and that this error, standing alone, requires that the Board's Order herein be set aside in its entirety.

The original Decision and Direction of Elections (Vol. III, G. C. Ex. 5(a)) designated February 24 as the cut off eligibility date. Pentecost was concededly both on the payroll and physically present performing his duties at the Commerce store since February 19—a full five days before the eligibility cut off date

—and for this reason alone Pentecost's vote should have been counted.[12]

Furthermore, despite the facts that (i) Pentecost was hired by F & G for employment in the Commerce store two and one-half weeks before February 17—the revised eligibility date established by the Regional Director's Supplemental Decision and Direction, (ii) his assignment to the Costa Mesa store was temporary and for training purposes only, and (iii) his salary while in training at Costa Mesa was charged to the Commerce store, the Regional Director nevertheless ruled that "Pentecost did not become an employee at Commerce until February 19, 1965." This decision is clearly contrary to numerous Board authorities, and particularly *Rohr Aircraft Corporation,* 104 NLRB 499 (1953), and *Johnson City Foundry and Machine Works, Inc.,* 75 NLRB 475 (1947).

In the *Rohr* case, the Board stated at page 502:

> "At the time of the hearing, 40 to 50 employees on the payroll of the Riverside plant were training at the Chula Vista plant for 'two or more weeks' for jobs at the former plant. Their training assignment, if not already completed, is in the nature of a temporary detail. We therefore find that these employees have a sufficient interest in the selection of a bargaining representative for Riverside plant employees to entitle them to vote in the election hereinafter directed."

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[12]Although the Regional Director's Supplemental Decision and Direction (Vol. III, G. C. Ex. 28(a)) states that the eligibility cut-off date was February 17, as noted earlier, this was in error in view of his original Decision and Direction of Elections (Vol. III, G. C. Ex. 5(a)).

In the *Johnson City* case the employee in question was an apprentice trainee who was required to spend 1000 hours in each of two job capacities outside of the voting unit before entering the unit. Despite the exceedingly long period of training outside the unit, the Board held at page 479:

> "It is apparent that this employee is primarily a foundry worker, and that his training assignment to a job outside the foundry proper, if that assignment is not already completed, is in the nature of a temporary detail. We shall permit him to vote in the election."

The facts with respect to Pentecost are, we submit, indistinguishable from those involved in the *Rohr* and *Johnson City* cases. Certainly, there can be no question whatsoever that Pentecost, just as the employees in the above two cases, had a sufficient interest in the selection of a bargaining representative for the Commerce store to entitle him to vote in the election held there. Indeed, in light of the Board's holdings in the *Rohr* and *Johnson City* cases, the facts herein present an *a fortiori* case for the conclusion that Pentecost was eligible to vote. Thus, in both these cases, by its reference to the training assignment if "not already completed," the Board specifically held that the employees in question were eligible even though they might still be training outside the voting unit on the date of the decision or, indeed, on the date of the election. Pentecost, on the other hand, was physically working in the voting unit before the date of the Decision and Direction of Elections and for over six weeks before the date of the election.

Despite these compelling authorities, the Regional Director sought to distinguish the *Rohr* case by holding that Pentecost was not "on the payroll" within the vague and mystical meaning attached by the Regional Director to that phrase. In so doing, emphasis was placed on the statement in Wall's affidavit that "I first put his name down on a store payroll of February 19." (G. C. Ex. 31, Ex. "A", p. 3). At the same time, however, the Regional Director wholly ignored earlier statements in the affidavit defining the "store payroll" as simply a record of hours worked each day by each employee in the store which, in turn, is submitted weekly to F & G's main office in Houston where the payroll is maintained and prepared and the checks are issued. Thus, Wall stated in his affidavit:

> "I keep a record of the hours worked by each employee daily. I transmit these records to Houston weekly on a Wednesday. Houston makes up the payroll, issues the checks and mails them back to me for distribution." (G. C. Ex. 31, Ex. "A", p. 2).

Since the "store payroll" is a record maintained by the store manager of the hours worked by employees at the store, obviously Pentecost's name could only have first appeared on the record maintained at Commerce on February 19, the first day that he physically worked at that location. Similarly, the hours worked by Pentecost at the Costa Mesa store could only have been recorded on the records maintained at that store since only the Costa Mesa manager, and not the Commerce

manager, could have known the hours worked by Pentecost at Costa Mesa. Thus, the record to which reference was made is nothing more than a document which confirms where Pentecost worked and when. As such, this record is no different than a card punched on a time clock—a device which, we assume, even the Regional Director would not regard as the "payroll".

In the *Rohr* case, the facts do not indicate, and certainly no one could logically assume, that the situation could have been any different. Surely, the hours worked by employees training at the employer's Chula Vista plant could only have been recorded, whether by management recording or by time clock, at Chula Vista where the work was in fact performed.

Finally, the facts herein are also analogous to those cases in which the Board has held that employees who are temporarily assigned to work outside of the voting unit are, nevertheless, eligible to vote. See, for example, *American Cyanamid and Chemical Corp.,* 11 NLRB 803 (1939) (employees temporarily transferred outside the voting unit to another plant of the employer held eligible to vote); *Great Lakes Steel Corp.,* 15 NLRB 510 (1939) (employee temporarily transferred out of the voting unit to another division of the employer held eligible to vote); *Quick Industries, Inc.,* 71 NLRB 949 (1946) (employee temporarily assigned outside the voting unit to work for a purchaser of the employer's product held eligible to vote); *Walton Lumber Co.,* 20 NLRB 573 (1940) (employees temporarily assigned to work for another employer held

eligible to vote in the voting unit); *E. J. Kelley Co.*, 99 NLRB 791 (1952) (employees temporarily assigned outside the voting unit to assist an independent contractor in construction work at the employer's premises held eligible to vote). See also *Armour & Co.*, 15 NLRB 268 (1939).

There can be no violation of Section 8(a)(5) of the Act in a case where the Board has improperly sustained challenges to ballots sufficient in number to affect the results of the election. *NLRB v. Joclin Mfg. Co.*, 314 F. 2d 627 (2nd Cir. 1963). For the foreging reasons, there was no violation of Section 8(a)(5) in this case.

VII.
CONCLUSION.

The record in the instant case is replete with errors, any one of which would warrant setting aside the Board's Order and Decision herein. All Petitioners herein at each juncture of the proceedings called these errors to the Board's attention, yet, from the very outset, the Board for reasons undisclosed on the record herein, determined not to confess error, and doggedly pursued the course chosen, compounding and recompounding its error, all to the prejudice of the Petitioners herein. It is axiomatic to state that the administrative process, no less than the judicial process, is a reasoned process. Yet, the instant proceeding before this Court cannot be rationalized. Only a petulant child at the controls of the machinery of the administrative processes of the Board could have produced the record that exists herein. It is within the ambit of the authority

of this Court and, indeed, this Court's paramount duty, to insure that such abuses of administrative processes do not go uncorrected.

It is submitted that for the reasons set forth in this Brief the Board's Order and Decision should be set aside and the complaint dismissed.

Respectfully submitted,

PAUL, HASTINGS, JANOFSKY & WALKER,

By DENNIS H. VAUGHN,

CARL W. ROBERTSON,

Attorneys for Petitioners.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CARL W. ROBERTSON.

Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside an Order of the National Labor Relations Board.

Brief of Petitioner K-Mart, a Division of S. S. Kresge Co.

CLARK, KLEIN, WINTER, PARSONS & PREWITT,
JOHN DONNELLY,
1600 First Federal Building,
1001 Woodward Avenue,
Detroit, Michigan 48226,
Attorneys for Petitioner K-Mart, a Division of S. S. Kresge Co.

Of Counsel:
HILL, FARRER & BURRILL,
STANLEY E. TOBIN,
411 West Fifth Street,
Los Angeles, Calif. 90013.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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JURISDICTIONAL STATEMENT.

This case is before this Court by way of three petitions, filed on behalf of six petitioners, praying that a Decision and Order of the National Labor Relations Board (reported at 162 NLRB No. 41)[1] be reviewed and set aside. As to each of the three petitions the Board has filed a cross petition for enforcement of its order. All six petitioners are engaged in business within this judicial circuit, in the state of California, and the unfair labor practices alleged in the complaint upon which the Decision and Order of the Board was entered allegedly occurred in California. Petitioners are aggrieved by such final order of the respondent cross petitioner (Board) and, therefore, this Court has jurisdiction under §10(f) of the National Labor Relations Act, as amended [61 Stat. 136 *et seq.* (1947), 29 USC §141 *et seq.* (1958)][2] The Board, in its cross petition and answers to the three petitions, has admitted petitioners' jurisdictional allegations.

I.
STATEMENT OF THE CASE.

A. History of the Case.

This case started on December 8, 1964 when the Retail Clerks Union Local No. 770 petitioned for an election in the San Fernando (21-RC-9308) and Commerce (21-RC-9309) K-Marts [Vol. I, pp. 9-10]. On the previous July 31, 1964, they had petitioned for

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[1]References to the documents reproduced in "Transcript of Record, Vol. I" are made by citation to "Vol. I" and to the page number where the documents appear. References to the stenographic transcript of the unfair labor practice hearing reproduced in "Transcript of Record, Vol. II" and to the stenographic transcript of the representation hearing, reproduced in "Transcript of Record, Vol. II-A" are made by citation to the appropriate volume and transcript page number. References to all undesignated exhibits are made by citation to Vol. III and to the appropriate exhibit number.

[2]The pertinent statutory provisions are reprinted, *infra,* at Appendix B.

elections at the Westminster (21-RC-9128) and Santa Ana (21-RC-9130) K-Marts [Vol. I, pp. 7-8]. On December 15, 1964 the Regional Director in Los Angeles ordered that the four petitions for elections at the K-Marts in Westminster, Santa Ana, San Fernando and Commerce be consolidated for hearing [Vol. III, G.C. Ex. 2(b)]. A consolidated hearing was held on January 18 and 19, 1965 before Hearing Officer Steinfeld in Los Angeles [Vol. II-A].

The principal issue in contention at that time, and since, is whether Licensee employees should be included with K-Mart employees in one bargaining unit. The union contended that Licensee employees should be included with the K-Mart employees in one bargaining unit. K-Mart (with the Licensees in agreement) maintained its position that the unit should consist only of K-Mart employees.

On February 24, 1965, the Regional Director, Ralph E. Kennedy, issued his Decision and Direction of Election in the Westminster, Santa Ana and Commerce stores, ruling that K-Mart and its Licensees were joint employers [Vol. III, G.C. Ex. 5(a)]. On March 5, 1965, K-Mart filed with the Board a Request for Review of the Regional Director's decision, objecting particularly to his finding that K-Mart and its Licensees were joint employers [Vol. III, G.C. Ex. 6]. The Board denied K-Mart's Request for Review on March 30, 1965 [Vol. III, G.C. Ex. 9]. This order of the Board was, of course, unappealable by K-Mart at that time.

The election was conducted at the Commerce K-Mart on April 7, 1965. The union received 37 votes; there were 33 votes against the union, and 9 ballots were challenged, this being enough to affect the outcome [Vol. III, G.C. Ex. 14].

On April 13, 1965, K-Mart filed six specific objections to the union's conduct prior to the election, which

conduct included numerous misrepresentations, threats, coercion and wrongful inducements of votes [Vol. III, G.C. Ex. 16]; on April 14, 1965, the union filed objections to K-Mart's conduct [Vol. III, G.C. Ex. 15]. As a result, and following an investigation which was completely *ex parte,* on June 30, 1965, the Regional Director issued his Supplemental Decision and Direction ordering a new election. He overruled all of the union's objections. He overruled all of K-Mart's objections except objection No. 3, which was upheld, and which related to the union's distribution of misleading handbills on the day before the election [Vol. III, G.C. Ex. 28(a)]. On July 12, 1965, K-Mart filed exceptions to and a Request for Review, in part, of the Regional Director's Supplemental Decision arguing that its objections Nos. 1, 2, 4, 5, and 6 should have been sustained, as well as its objection No. 3 [Vol. III, G.C. Ex. 32]. The union also filed with the Board exceptions and a Request for Review of the Regional Director's Supplemental Decision and Direction objecting, among other things, to his ruling on K-Mart's objection No. 3 [Vol. III, G.C. Ex. 29].

On July 20, by a telegram Order, the Board denied K-Mart's Request for Review "as raising no substantial issues warranting review." However, the Board granted the union's Request for Review insofar as it concerned the Regional Director's sustaining of K-Mart's objection No. 3; with respect to that objection, the Board ordered the Regional Director to open and count the challenged ballots and if the union lost, to consider the issue represented by K-Mart's objection No. 3 as moot; but if the union won, the Board would review the Regional Director's disposition of K-Mart's objection No. 3 [Vol. III, G.C. Ex. 35].

Pursuant to the Board's telegram Order and on July 23, 1965, the Regional Director opened five of the nine challenged ballots (the other four voters having

been found ineligible) and found four against the union and one for the union. Thus, the tally of ballots showed a vote of 38 to 37 in favor of the union [Vol. III, G.C. Ex. 36]. Thereafter, K-Mart filed a brief in support of the Regional Director's determination on objection No. 3 [Vol. III, G.C. Ex. 37], but on September 9, 1965, the Board overruled its Regional Director on this point, upheld the union, denied K-Mart's request for oral argument and certified the union as bargaining agent [Vol. III, G.C. Ex. 40].

On September 21, 1965, the union demanded that K-Mart meet for the purposes of collective bargaining [Vol. III, G.C. Ex. 41 "A"]. No demand was made at this time on the Licensees. By letter dated September 29, 1965, K-Mart refused to bargain with the union on the grounds that the unit was inappropriate and that the employees had not had a "free, untrammeled and uncoerced" election [Vol. III, G.C. Ex. 41 "B"]. On October 5, 1965, the union filed unfair labor practice charges against K-Mart, alleging that it was guilty of a refusal to bargain (Section 8(a)(5)) (21-CA--6937) [Vol. III, G.C. Ex. 1(a)].

On October 18, 1965, the union made demand by letter on all the Licensees except Zale Jewelry (which had commenced operations in the Commerce K-Mart after this proceeding had started) and the Licensees separately refused to bargain [Vol. III, G.C. Ex. 42 "A" and "B", 43 "A" and "B", 44 "A" and "B", 45 "A" and "B", 46 "A" and "B", 47 "A" and "B"].

On December 10, 1965, the acting Regional Director of the 21st Region issued a complaint against K-Mart and its Licensees alleging an unlawful refusal to bargain [Vol. III, G.C. Ex. 1(c)]. K-Mart, in its Answer to Complaint, denied that its action was unlawful [Vol. III, G.C. Ex. 1(g)].

On March 22, 1966, a hearing was conducted on the unfair labor practice charges before Trial Examiner

William E. Spencer [Vol. II]. On June 17, 1966, this Trial Examiner issued his Decision containing a recommended Order that K-Mart and the Licensees, Gallenkamp Stores, Co., Mercury Distributing Company, Acme Quality Paints, F & G Merchandising, Hollywood Hat Company and Besco Enterprises, Inc., bargain with the union [Vol. I, pp. 305-313]. Exceptions were subsequently filed by K-Mart to this Decision of the Trial Examiner, [Vol. I, pp. 314-317]. In this Decision and Order the Board merely amended the recommended Order by deleting the individual names of the Licensees and substituting a generic description [Vol. I, p. 326].

This Petition for Review from the Decision and Order of the Board, dated December 30, 1966, in this Case No. 21-CA-6937 then followed [Vol. I, p. 329].

B. The Facts of the Appropriate Bargaining Unit.

(1) The License Agreement.

S. S. Kresge made a decision several years ago. It was just entering the discount department store business by the institution of its K-Mart stores. It planned to operate many of the departments in these stores by licensing them out to independent merchants. The decision which had to be made was whether S. S. Kresge Company should control the labor relations of these independent merchants, or to leave this matter in the merchants' own hands.

The decision which S. S. Kresge Company made was to let the independent merchants run their own labor affairs. It accordingly drafted its standard License Agreement to achieve that purpose. Under National Labor Relations Board and court decisions of those days, it accomplished that purpose.

The Board has now told S. S. Kresge Company that its License Agreement didn't do any such thing. For it has determined that the appropriate bargaining unit in

the Commerce, California K-Mart (the store involved in this appeal) must consist of employees of K-Mart *and* employees of the licensees in that store; this being on the theory that K-Mart had the legal right to, and did in fact, dominate the labor relations of its licensees, thereby making them "joint employers." And this has raised one of the issues which is fundamental in this case, namely, whether S. S. Kresge Company, or any other merchant, has the right to enter into a contract with operators of licensed departments in discount department stores under which the licensees retain their independence in labor matters.

At the time of the representation hearing (21-RC-9309), the Commerce, California K-Mart included the following licensees: (a) Gallenkamp Stores Co., selling shoes; (b) Mercury Distributing Company, selling ready-to-wear, men's wear, infants' wear and lingerie; (c) Acme Quality Paints, selling home improvements, such as paints; (d) F & G Merchandising, selling automobile accessories and servicing automobiles; (e) Hollywood Hat Company, selling hats and purses; and (f) Besco Enterprises, Inc., selling jewelry and cameras [Vol. II-A, pp. 38-39].

The Licensees at the Commerce, California K-Mart all operated under the standard K-Mart License Agreement [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1].

The License Agreement contained certain rules which pertained to the retail operation of each Licensee. Thus, it provided a formula for the payment of rent, it covered the furnishings of fixtures, the operation of cash registers, the use of the K-Mart name, minimum standards for the maintenance of Licensee's area in the store, advertising and merchandising arrangements, provisions covering damages to property or persons, and other similar provisions which could be expected in an agreement of this sort. Its provisions were primarily aimed at the details of the retailing relationship.

The License Agreement said very little about personnel matters, and nothing about labor relations matters. Paragraph 4 of the License Agreement required the Licensee to comply with all statutes respecting health and welfare benefits of "its employees". Paragraph 10 authorized K-Mart "for the benefit of the common enterprise" to adopt Rules and Regulations "consistent with this License Agreement", which, as the License Agreement put it, "shall govern but not be limited to the following subjects: order and appearance of the store, methods for handling of cash and cash registers, credit, will-call and lay-away sales, payments made by Licensor for account of Licensee, refunds, pricing policies, inventory requirements, disposal of old merchandise, overlap in merchandise carried by various Licensees, products liability insurance, employment practices, personnel and store policies, receiving of merchandise and store security."

To summarize, then, the License Agreement concerned itself with the merchandising aspects of the business relationship between Licensor and Licensee. Consonant with the parties' intent, the License Agreement did not purport to cover any matters which are traditionally thought of as essential to labor relations policy.

License agreements in retail operations akin to K-Marts frequently contain clauses specifically providing that the Licensor has control over the labor relations of the Licensees.[3] No such clause is found in the K-Mart License Agreement.

License Agreements also frequently provide that the Licensee may enter into collective bargaining agree-

[3]For example, this provision appears in License Agreements found in the following cases: *Franklin Simon & Co.,* 94 NLRB 576 (1951); *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962); *Spartan Dept. Stores,* 140 NLRB 608 (1963); *Grand Central Liquors,* 155 NLRB No. 33 (1965).

ments only with the consent of the Licensor, or that the Licensee agrees to be bound by any collective bargaining agreement negotiated by the Licensor.[4] No such provision appears in the K-Mart License Agreement.

The License Agreement does not reserve to K-Mart any of the following: the right to hire or control the hiring of Licensee employees; the right to discharge or control the discharge of any Licensee employees; the right to discipline or control the discipline of any Licensee employees; the right to determine or control the determination of rates of pay, or fringe benefits of Licensee employees; the right to give direct orders to Licensee employees; the right to control a Licensee's attitude or relations towards unions, strikes, union contracts, bargaining, election campaigns leading to Board elections, or other matters relating to labor relations policies, or any control, direct or indirect, over any other subject matter which is normally considered to be a part of the labor relations of Licensee.

The License Agreement not only does not specifically create a joint employer relationship, it actually prohibits such a relationship in Section 22 which reads: "The parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship."

Pursuant to the right reserved to it at Paragraph 10 of the License Agreement K-Mart has issued a standard printed set of Rules and Regulations [Vol. III, G.C. Ex. 2(c) Ex. 2]. Even a cursory review of

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[4]This type of condition may be found in the License Agreements involved in the following cases: *Gaylord Discount Stores,* 137 NLRB 125 (1962); *Frostco Super Save Stores, Inc.,* 138 NLRB 125 (1962); *United Stores of America,* 138 NLRB 383 (1962); *Spartan Dept. Stores,* 140 NLRB 608 (1963); *Bab-Rand Co.,* 147 NLRB 247 (1964); *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964); *New Fashion Cleaners, Inc.,* 152 NLRB 284 (1965); *Bargain Town USA of Puerto Rico,* 162 NLRB No. 94 (1967).

these rules and regulations demonstrates that they do not attempt to exercise control of labor relations matters of Licensees. On the contrary, they merely contain some general provisions of common interest to all of the employees in the K-Mart including rules which set down minimum standards of decorum. A prime illustration of the Rules and Regulations' non-involvement in labor relations matters is found at page 1, under the heading "Employment", where each licensee is expressly given the right to hire and fire its own employees, in this language: "All hiring and terminations, so far as they apply to each Licensee, will be under the supervision of the Licensee's manager."

The Rules and Regulations also make it clear that K-Mart has no control over the settlement of a Licensee's labor dispute. Indeed, the only reference to this subject is found at page 2, subparagraph C, under the heading "General Operation of Store" at which point the Licensee is directed not to permit the continuance of a labor dispute which "materially affects" the sales or threatens the operation of the Licensor or other Licensees. It is quite significant, however, the no power is given to K-Mart to dictate the terms of any such settlement.

(2) How the Parties Applied the License Agreement.

Neither the License Agreement nor the Rules and Regulations have any language giving S. S. Kresge control of the labor relations of the Licensees. The parties obviously believed that Kresge did not have such control under the License Agreement. Their conduct proves this.

This conduct—unchallenged and remarkable in its consistency—tells this story:

(a) The wage of each of the employees of each of the Licensees is determined by the Licensee independent of K-Mart and K-Mart has no power,

potential or otherwise, to affect the Licensees' wage formulae and K-Mart has never attempted to do so [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47; pp. 55-56].

(b) The employees of the Licensees receive different and separate benefits from their employers than K-Mart employees, including Christmas bonuses, holiday allowances, Blue Cross protection, group life insurance, stock purchase plan participation, and vacations [Vol. III, G.C. Ex. 2-(a), Vol. II-A, pp. 51-54].

(c) The employees of K-Mart have in the past been permitted discounts on purchases made of K-Mart products, but the employees of Licensees were not afforded the same benefit [Vol. III, G.C. Ex. 2(a), Vol. II-A, pp. 48-49].

(d) The Licensees separately determine the hours of work for each of their employees and these hours are often different from hours of work of the employees of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47; pp. 54-55].

(e) None of the employees of K-Mart at any time works for or does the work of any Licensee [Vol. III, G.C. Ex. 2(a), Vol. II-A, pp. 49-50; p. 101].

(f) None of the employees of the Licensees works for or does the work of K-Mart [Ibid].

(g) A number of the employees of some or all of the Licensees are employed on frequent occasions by the various Licensees at locations other than K-Marts and at locations totally independent of the K-Mart or Kresge enterprises [Vol. III, G.C. Ex. 2(a), Vol. II-A, pp. 50-51].

(h) The number of employees each Licensee has and the particular task that these employees do are

determined solely, separately and independently by the Licensees, and K-Mart has made no attempt to interfere with the Licensees in this regard [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47].

(i) The previous experience required of employees of various Licensees often differs greatly with that of the employees of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 56].

(j) None of the employees of any of the Licensees reports to any of the supervisors of K-Mart, and the supervisors of K-Mart do not supervise any of these employees in any manner, shape or form [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 39; pp. 45-46; p. 228].

(k) Neither K-Mart nor any of its supervisors has any authority to discharge any employee of any Licensee, nor can any Licensee interfere in any manner with the day-to-day work assignments of any employee of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 45-46; pp. 225-226; p. 228].

(l) Each of the Licensees has, in addition to its own supervisor, one or more supervisors, at times referred to as roving supervisors, who spend all or a considerable amount of their time managing and supervising its operations in the K-Mart stores, and in particular the K-Mart store here in question [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 56-58; p. 65; pp. 208-209; p. 300].

(m) Neither these roving supervisors nor any other supervisor of the Licensees stationed in each of the stores reports to or receives directives from K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 56-58].

(n) Each of the Licensees determines for itself what its merchandise price policy will be for the prod-

ucts it sells. Such determinations are almost always made without consultation or approval of K-Mart [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 47; p. 224; pp. 227-228].

(o) Each Licensee determines for itself which line of merchandise it will sell in its concession department and, in practice, the Licensor makes no effort to interfere with the independent judgment of its Licensees [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 48].

(p) The employees of the Licensees, on the one hand, and the employees of K-Mart, on the other hand, are treated separately by their employers in regard to Unemployment Compensation, Workmen's Compensation, and Federal and State tax assessments [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 46-47].

(q) The personnel and payroll records, including the timecards of the Licensees' employees are kept separate and independent from those kept by K-Mart of its employees, and K-Mart has no control, access, or information in its files concerning the employees of or number of employees of the Licensees [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 47].

(r) Each of the Licensees separately has its separate payroll and separate method of paying its employees by its own checks [Vol. III, G.C. Ex. 2(a), Vol. II-A pp. 29-40; p. 47; p. 49].

(s) All accounting and bank deposits of K-Mart are separately handled independently from those accounts and bank deposits which each of the Licensees handles by itself [*Ibid.*].

(t) K-Mart has no knowledge or access to the profit or loss data of each or any of its Licensees [Vol. III, G.C. Ex. 2(a), Vol. II-A p. 55].

(u) While there is a central desk where customers may bring complaints regarding a purchase of merchandise or services, in many instances complaints are brought directly to the Licensees; in most instances, complaints are initially brought to the Licensees, and in virtually all instances, the Licensee has and exercises the final right to determine the validity of any particular complaint [Vol. III, G.C. Ex. 2(a); Vol. II-A p. 56; pp. 93-98].

(v) Each of the Licensees separately handles its own incoming freight [Vol. III, G.C. Ex. 2(a); Vol. II-A p. 49].

(w) Each of the Licensees has its separately listed and installed phone number and may be reached by customers independently from the central exchange of K-Mart [Vol. III, G.C. Ex. 2(a); Vol. II-A p. 296].

(x) While there is a practice in many instances for K-Mart to advertise its products jointly with the products of the Licensees, at least two of the Licensees separately purchase and advertise independently from K-Mart [Vol. III, G.C. Ex. 2(a); Vol. II-A pp. 84-85; pp. 194-195]. In all cases, the Licensees themselves determine the format of that portion of any joint advertising that is conducted by K-Mart and the Licensees [Vol. III, G.C. Ex. 2(a); Vol. II-A pp. 44-45; pp. 84-86; pp. 194-195; pp. 295-296].

(y) In practice, numerous personnel directives and regulations promulgated and enforced by K-Mart have no application to and are not the concern of the employees of any of the Licensees [Vol. III, G.C. Ex. 2(a); Vol. II-A pp. 214-223; Vol. III, G.C. Ex. 2(c), Employer's Ex. 3(a)-(f)].

All of the foregoing testimony is absolutely uncontradicted. It has never been disputed or even discussed by the Board at any stage of this proceeding.

C. The Facts of the Union's Misconduct Prior to the Election.

The Union allegedly "won" this election on April 7, 1965 by a single vote—38 to 37. However, the undisputed facts show that this "victory" was the product of union acts of misconduct, including threats, misrepresentations and coercion. Significantly, the Board has assumed that the following acts of misconduct occurred precisely as K-Mart's witnesses alleged:

1. On the evening prior to the election, that is on April 6, 1965, the union distributed to the employees handbills which gave false information on two counts of critical importance. The handbills compared alleged K-Mart rates with "union" rates and purported to show that the latter were higher than the K-Mart rates listed. In the first place, some K-Mart employees received a wage scale higher than that listed for K-Mart in the leaflet. Secondly, "union" rates were in fact not the wages received by employees in unionized stores, but were actually the highest of four categories of wage levels for the classifications involved and did not apply to any employees until they had acquired one year of service. There were a substantial number of K-Mart employees who had less than one year of service at that time [Vol. III, G.C. Ex. 16, Objection No. 3].

2. Certain K-Mart employees were threatened with loss of jobs if the union did not win the election [Vol. III, G.C. Ex. 16, Objection No. 1]. One, Elaine Williams, was told "If you don't join the union and the union is voted in, you will lose your job." [Vol. III, G.C. Ex. 21, Exhibit "A"]. Another, Linda Crabtree, was told ". . . if the union gets in and you

don't vote for us you'll be looking for another job." [Vol. III, G.C. Ex. 21, Exhibit "B"].

3. A K-Mart stock boy, Leo Hosey, was terrified by union representatives and was told that "You we don't want. You'd better hope that the union doesn't get in"; and on another occasion "We know you, Leo, and when we get in, we'll get you." In addition, this employee was placed under open surveillance by the union and followed to and from his place of work [Vol. III, G.C. Ex. 6, Objection No. 2]. Hosey subsequently denied he had been threatened but it was obvious that it was his fear that caused this later denial. He himself admitted ". . . I was scared of the union". The true facts were accurately set forth in affidavits furnished by other employees, including an eye-witness to the threats, Gordon Bloomfield [Vol. III, G.C. Ex. 21, Exhibit "C"], V. L. Cooper [Vol. III, G.C. Ex. 21, 32, Exhibit "D"], Michael Castanon [Vol. III, G.C. Ex. 21, 32, Exhibit "E"] and Irene Reyes [Vol. III, G.C. 21, 32, Exhibit "F"].

4. On election day, shortly before the polls opened, a union representative made false and misleading statements on material matters to a 19-year-old female employee of the K-Mart store, Carol Platteborze [Vol. III, G.C. Ex. 16, Objection No. 6]. Miss Platteborze was told [Vol. III, G.C. Ex. 21, Exhibit "L"; G.C. Ex. 32, Exhibit "J"]:

(a) That there would not be double dues assessments at K-Mart and that "double dues is done approximately every four years or so." In fact, each of the above statements were untrue [Vol. III, G.C. Ex. 32, Exhibit "I"].

(b) That a victory for the union automatically guaranteed certain specific wage and other contract benefits for K-Mart employees when in fact any such "benefits" would only be those agreed upon by the parties in collective bargaining negotiations.

(c) That the Union had not had a strike in 25 years, which statement was entirely false; that if an impasse in negotiations should occur "all the employees' jobs would be given back to them because it was in the contract that the job must go to those with the most seniority", which is completely contrary to Supreme Court decisions permitting the permanent replacement of economic strikers; and that in the event of an economic strike, "the employees are paid . . . unemployment for 35 weeks plus 13 weeks, if necessary, so they could be on strike for a year and get paid for it," a statement diametrically opposed to the provisions of Section 1262 of the California Unemployment Insurance Code which declares that unemployment compensation is not paid to economic strikers.

(d) That under an open shop agreement nonunion employees would be paid at a lower rate than union members, a representation which, to those knowledgeable, is an unfair labor practice in violation of Section 8(a)(3) of the Act.

(e) That if employees changed their mind after certification of the union, "30 days after the union enters a decertification petition can be filed downtown". This statement is completely contrary to the Act; Sections 9(c)(3) and 9(e) forbid a decertification election for one year after a previous valid certification election, and even then only permit the same upon petition of 30 percent of the employees in the unit.

5. The union was misleading employees during the compaign by the distribution of a letter and card [Vol III, G.C. Ex. 16, Objection No. 5; G.C. Ex. 21, Exhibits "G" and "H"] to all employees which showed that the union would waive the usual initiation fee, but only in the event the union won the election, which is an improper and illegal promise to make pending an election.

6. Approximately one week prior to the election, the union sent letters to K-Mart employees which falsely advised them that they would "not be required to pay double dues as some of the members have voluntarily voted to do." [Vol. III. G.C. Ex. 16, Objection No. 4; G.C. Ex. 32, Exhibit "G"; see also Exhibit "H"] yet an article contained in the union's own news publication stated that the double dues requirement applied to "all members" and the only exception suggested were those in employee classifications not relevant to K-Mart employees.

II.
SPECIFICATION OF ERRORS RELIED UPON.

The National Labor Relations Board erred in the following respects:

1. In concluding and holding that Petitioner, K-Mart, together with the Licensees at its discount store in the City of Commerce, State of California, are joint employers and, as such, must bargain collectively as to wages, hours and other terms and conditions of employment with Retails Clerks Union Local No. 770.

2. In concluding and holding that the standard License Agreement and the Rules and Regulations promulgated thereunder by K-Mart reserved to K-Mart actual control, or the right to control, the labor relations policies of its Licensees.

3. In concluding and holding that K-Mart in fact exercised substantial control over the labor relations policies of its Licensees.

4. In failing to conclude and hold that K-Mart has not controlled, and is not capable of controlling, the labor relations policies of its Licensees and, therefore, is not a joint employer of its Licensees' employees.

5. In concluding and holding that the Retail Clerks Union is the *bona fide* representative of a free and un-

coerced majority of employees in a unit appropriate for purposes of collective bargaining.

6. In failing to conclude and hold that the Retail Clerk's Union Local No. 770 engaged in coercive, threatening, misleading, false and other improper and unlawful conduct which unlawfully interfered with the free and untrammeled choice of employees in the unit found appropriate by the Board, and that said conduct invalidated the election of the union as collective bargaining agent for K-Mart employees.

III.
SUMMARY OF ARGUMENT.

A.

The Board's Order that K-Mart and its Licensees bargain as joint employers with the union is not supported by substantial evidence in the record and represents unsound labor policy frustrating the purposes of the Act. The underlying joint employer finding is based on an improper legal interpretation of the License Agreement and Rules and Regulations under which the parties operated. Neither the language of the License Agreement nor the conduct of the parties thereunder, was such that the Board could reasonably infer that K-Mart actually controlled, or had the right to control, labor relations policies of its Licensees. Indeed, all of the record evidence is to the contrary. The determination that K-Mart must bargain as a joint employer is the result of improper conclusions based other than on the record in this proceeding and represents the abandonment of a long standing and sound basis for determining retail joint employer cases in favor of an arbitrary, unsound and unlawful rule.

B.

The Union was improperly certified by the Board as the bargaining agent for K-Mart employees when the record conclusively demonstrates that its election "vic-

tory"—gained by the margin of a single vote—was the product of a concerted pre-election union campaign of threats, misrepresentations and coercion. This illegal union conduct consisted of (a) the distribution of leaflets materially misrepresenting facts regarding competitive wage rates; (b) threatening K-Mart employees with loss of jobs if they did not join or support the union; (c) threatening K-Mart employees with physical and other reprisals; (d) misrepresenting facts to a K-Mart employee on election day; (e) illegal offers to waive initiation fees contingent on the results of the election; and (f) circulating letters which misled employees with respect to payment of double union dues.

Incredibly, each of the above incidents were dismissed by the Board as insufficient in law to warrant setting aside the election, even though the Board found it necessary to assume that the K-Mart witnesses who testified to this union activity by affidavit, truthfully and accurately described the union's conduct. Each act, standing alone, provides more than an ample basis for invalidation of the union's certification. Viewed in combination, these acts legally necessitate that result.

IV.
ARGUMENT.

A. The National Labor Relations Board's Order That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Represents an Unsound and Improper Labor Policy Which Frustrates the Purposes of the National Labor Relations Act.

This was a shotgun marriage. And like most shotgun marriages, it won't work well. And it won't work well because independent employers are being forced against their will to bargain as one with the union. The problems this creates will not contribute to sound bargaining relationships and constructive collective bargain-

ing and therefore will tend to frustrate the fundamental purpose of the National Labor Relations Act.

K-Mart thought it had drafted a License Agreement which reserved to its Licensees their individual independence in labor relations matters. When it signed the License Agreements it did not believe it was taking over or controlling, or obtaining the right to take over or control, the labor relations policies of its Licensees. In its operation of this K-Mart in Commerce, California, K-Mart impeccably observed the independence of its Licensees in labor matters. Now it is told by the Board that it was wrong; that it didn't know its own intentions when it drafted its standard License Agreement; that it was acting in error when it operated the K-Mart under the belief that each Licensee was master of its own labor relations policies; and that even though it didn't want to, it must act as one employer with its Licensees.

And the Licensees felt as K-Mart did. When they signed the License Agreement they believed they were retaining control of their own labor relations in operating their license department at the Commerce K-Mart. They certainly acted as though they retained this independence. They hired and fired their own people. They set their own wage rates. They applied their own fringe benefit programs. They supervised and disciplined their own employees. At no time did they even ask K-Mart for help in these fundamental labor relations areas. And yet they are now told by the Board that they signed away this independence to K-Mart when they signed the License Agreement and against their will, they must bargain as a "joint employer" with K-Mart.

The difficulties presented to the parties if they must bargain as joint employers are many. Merely calling them "joint employers" does not solve these problems. First, these unwilling employers must determine

whether the statutory obligation to bargain is primarily that of the K-Mart on the theory that it has the power to control the labor relations policies of its Licensees. On this theory presumably (the Board did not enlighten the parties) K-Mart would be in active charge of negotiations with the union. K-Mart would make the determination of what wages would be paid the Licensees' employees, as well as K-Mart employees, and what fringe benefit programs would be applicable. In other words, K-Mart would be the employer. And while it would be free to consult with its Licensees, the basic statutory obligation of recognizing the union and bargaining with them would be K-Mart's. Or it is possible that when the Board called these employers "joint employers" it meant that they each had an independent and separate statutory obligation to bargain with this union, but the bargaining must take place at one bargaining table. This would indeed be a cumbersome and awkward result.

The problem is further complicated because some of the Licensees at the Commerce K-Mart are units of large national chains and some are small "ma and pa" operations. K-Mart, the Licensor, is a division of S. S. Kresge Company, a national retail chain; Gallenkamp and Mercury Distributing Company are divisions of Shoe Corporation of America; F & G Merchandising is a subsidiary of U. S. Rubber Company; Acme Quality Paints is a subsidiary of Sherwin Williams Company; Zale Jewelry (not an original party to this cause but now operating in this K-Mart) is a New York based corporation owning more than 400 stores in 41 states. Such large organizations have their own individualized national policies involving labor relations matters, such as wage scales, pension plans, insurance progams, and the like. These basic policies undoubtedly differ from those of the other large chains with which they are being forced to bargain. And two of the orig-

inal Licensees, Hollywood Hat Company and Besco Enterprises are small companies. Such small retail companies often are forced to adopt labor relations policies at sharp variance with the much larger national chains.

No doubt the Board will answer that these problems can be overcome through joint efforts of the employers—a sort of inter-employer collective bargaining. And no doubt it can be pointed out that employers do bargain jointly, and have for many years, without seriously undermining the collective bargaining process or the bargaining relationships of these employers. The answer to this is, of course, that *voluntary* joint bargaining by employers does work and has worked in many bargaining situations. For such employers enter the joint bargaining relationship voluntarily and with their eyes open. They know that they must work out the problems of a common bargaining posture with their fellow employers in order to make a joint bargaining relationship successful. Frequently the joint employers are competitors in the same business who are interested in maintaining the same labor costs so that no employer gains an undue competitive advantage. Moreover, there is a safety valve available to voluntary joint employers, namely, they may withdraw from the joint bargaining relationship if they find it unworkable and detrimental to sound bargaining relations with their own union.

But we are talking in this case about a joint employer relationship which is forced upon unwilling employers. Here no one has entered the relationship willingly and because of that the resolution of differences in bargaining programs and in wage and benefit scales might be all but impossible.

The small Licensee, for example, may truly be unable to afford the economic program that the large chains

would be willing to agree to. In this event, with possible business failure facing him, it is probable that such a Licensee would be forced to argue strongly for his point of view and dispute any program that he felt would put him out of business. We do not think it is in accordance with the purposes of the Act if such a small employer is finally forced to go along by his bigger brothers and this then puts him out of business and his employees lose their jobs and seniority. The Licensees, as units of large chains will also have the problem of reconciling their various national programs in connection with wage and fringe benefits. Should a fundamental difference of opinion occur between two large chains, and if the firms feel strongly enough about it, one more hurdle must be cleared before the so-called "joint employers" face the bargaining table. For no safety valve is available to these employers, as it is to those who voluntarily agree to joint bargaining, namely, the right to withdraw from the joint bargaining relationship.

And there are employee rights which must be protected. For in its zeal to force the employers in K-Mart to bargain jointly, the Board has deprived the employees of each employer of their right to determine if they want a union, and, if so, which one. The courts have agreed that employee rights are of vital importance and have held that even where employers *voluntarily* agree to joint bargaining, the approval of such action must be given only with great caution for fear of violating the rights of the employees of various employers. See *NLRB v. Local 210 Teamsters Union* 330 F. 2d 46 (2d Cir., 1964), 12 ALR 3d 800, and cases cited in ALR note which follows.

The attitude of the Board in *Local 210 Teamsters', supra,* is summarized by the General Counsel's brief to the Board in that case, as follows:

> "A multiemployer unit is not naturally and inherently appropriate, as is a unit limited to employees of a single employer or a single plant, units specifically mentioned in Sec. 9(b) of the statute. *Rainbo Bread Co. 92 NLRB 181; Arden Farms, 117 NLRB 318.*
>
> "In order to protect employees fom arbitrary invasion of their rights, the Board has prohibited employers and unions from including employees in a multiemployer unit contrary to the wishes of a majority in any constitutent unit. [citations omitted]"

The philosophy expressed by the General Counsel in that case and by the courts in the cases subsequently discussed in the ALR note is a correct analysis of the crucial factors involved, namely, that where the employers voluntarily wish to enter into a joint bargaining relationship approval should be granted cautiously because of the danger of violating the rights of the employees involved. And we think it evident that the same caution should be exercised for the same reason before forcing unwilling employers to enter into joint bargaining. We regret the Board changed its attitude in the instant case.

We think a consideration of these problems indicates an obvious conclusion—the Board should never require employers to bargain jointly except in two instances: (1) where the employers have voluntarily agreed to bargain jointly, or (2) where the evidence is clear and convincing that one employer does in fact have the right to and does control the labor relations policies of the others; and where there are any doubts, they should be resolved in favor of independence in bargaining, not in favor of joint bargaining.

We think that at one time this was clearly the Board's position. But this case, and recent decisions of the

Board in other cases, indicate that the Board no longer adopts this policy. For the recent opinions of the Board, which we will discuss more thoroughly later in this brief, seem to say that if the Licensor and Licensees in a retail establishment such as K-Mart give to the public the appearance of a single integrated operation, then the employers must bargain jointly—one of the more remarkable *non sequiturs* in modern legal history. And we think this case illustrates that the Board either is going to require joint employer bargaining when there is such an appearance to the public or that it is going to resolve all doubts in favor of joint bargaining when it considers the records in each case; and if there is a single clause, or word, or action, which, by the widest stretch of legal imagination, could be found to indicate an influence by one employer upon another, that the joint employer relationship must be observed. No other conclusion is possible when the record in this case is carefully reviewed. For that record, which we would like to discuss now, was almost totally ignored by the Board in making a finding that K-Mart and its Licensees were "joint employers".

B. The Board's Order That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Based Upon an Erroneous Determination That K-Mart Controls the Labor Relations Policies of Its Licensees, Which Determination Is Based Upon an Improper Legal Interpretation of the License Agreement Under Which the Parties Operated.

1. The License Agreement Did Not Give K-Mart the Right to Control or Influence the Labor Relations Policies of the Licensees.

The standard K-Mart License Agreement signed by the parties when considered as a whole not only does not give K-Mart control of the labor relations policies of the Licensees—it specifically contradicts this.

The second paragraph of Section 22 of the License Agreement shows that the parties did not intend to create a joint employer relationship. It reads:

> "The parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship." [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 8].

No other conclusion can be drawn from a reading of this language.

In 1964 the Board found, on virtually identical language in a License Agreement, that no joint employer relationship existed. In *Bab-Rand Co.,* 147 NLRB 247, 249 (1964) the Board stated this with respect to the License Agreement there involved:

> "The record clearly establishes, and we find, that White Front and the Employer are not joint employers.[4] [Citing S.A.G.E. Inc. of Houston, 146 NLRB 325] Thus, the License Agreement executed by them specifically provides that: '*This agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto* or any relationship between them other than that of Licensor and Licensee * * *. In addition, neither the contract nor the License Agreement provides for the common handling of labor relations for the Employers' employees. To the contrary, the agreement provides that if the Licensee becomes involved in any labor difficulty as a result of which the store is threatened with being picketed the Licensor shall have the right to terminate the License Agreement upon 24 hours' written notice, given at any time after such threat is received by it or such picketing is commenced." (Emphasis supplied).

If the names of the parties were changed, the above statement could apply in this case.

All paragraph 9 of the License Agreement says the same thing. It reads:

> "*Use of Name.* The Licensee shall conduct its sales on the premises solely under the name of K-mart. The Licensee, however, may neither pledge the credit, incur any obligation or liability, *hire any employees,* nor purchase any merchandise or services under the name of the Licensor or K-mart, it being understood that *neither party to this Agreement shall act as the agent, servant or employer of the other party.*" (Emphasis supplied). [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 4].

In 1964 the Board found that the existence of this language in a License Agreement precluded a finding of a joint employer relationship. In *S.A.G.E. Inc. of Houston,* 146 NLRB 325, 327 (1964), the Board stated this with respect to similar language:

> "The license agreement specifically provides that *neither party shall hold itself out to be or act as the agent, servant, or employee of the other and that the relationship between the two parties shall be only that of licensor and licensee.*" (Emphasis supplied).

If the names of the parties were changed, the above statement could apply in this case.

The conclusion that the parties intended to run their own labor matters is further strengthened from other language in the License Agreement. Quite obviously the License Agreement was drawn on the assumption that employees of the Licensees were to remain such and were not to become the employees of K-Mart. For example, paragraph 4 covering statutory obligations to employees contains a clause under which the Licensee agrees to comply with statutory requirements relating to "its employees." [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 3]. And paragraph 6 relat-

ing to cash registers refers to both "Licensees' employees" and "Licensor's employees" [p. 4]. Paragraph 19 relating to the Licensor being relieved of public liability by the Licensees refers to damages caused by "employees of the other party" [p. 6].

A reading of the License Agreement as a whole, and a fair consideration of the provisions therein show that this was primarily an agreement to control the merchandising policies of the Licensees and, to the extent that it touched upon personnel matters, it merely established minimum standards of decorum and conduct necessary for a proper retail operation. Nowhere in the License Agreement has K-Mart reserved to itself, directly or indirectly, the right to control the hiring or firing of Licensee employees; or the right to control the discipline of any Licensee employees; or the right to determine or dictate the rates of pay or fringe benefits of Licensee employees; or the right to give direct orders to Licensee employees; or the right to dictate, direct, influence or control any segment of the Licensees' labor relations policies. This in itself is highly significant. For certainly if K-Mart wanted control in these areas it would not have omitted language covering these important areas. Under ordinary principles of contract law, a contract which is silent in these areas would hardly be construed by a court to mean that the Licensees have given up such a valuable right. For in turning over control of labor relations policies the Licensees would be turning over to K-Mart control of an important segment of their operating costs. And it hardly needs the citation of authority to tell this Court that in the discount retail business where slim profit margins are the rule, the control of costs is of paramount importance. Such control would not be given up lightly, and certainly not without express language in the License Agreement.

It should also be kept in mind that in the retailing field there are two schools of thought concerning the Licensor's control of the Licensees' labor relations policies. In our Discussion of the Facts of the License Agreement at the beginning of this brief we referred to examples of License Agreements which specifically reserved to the Licensor control of the labor policies of the Licensees or controlled the negotiation and execution of labor contracts. S. S. Kresge Company does not subscribe to this philosophy. As we have said before, it does not want to control the labor relations policies of its Licensees. It does not think it now has that power. And it does not want the Board or a Court to give it that power. We belong, in other words, to the other school of thought which believes that the Licenses should be responsible for their own labor relations policies.

2. The Rules and Regulations Promulgated Under K-Mart's License Agreement Did Not Exercise Control Over or Influence the Labor Relations Policy of the Licensees.

K-Mart has reserved to itself under paragraph 10 of its License Agreement the right to issue Rules and Regulations "consistent with this License Agreement" [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 4]. K-Mart exercised this right and issued a standard set of such Rules and Regulations [Vol. III, G.C. Ex. 2-(c), Employer's Ex. 2].

Here, as with the License Agreement, a fair reading of this set of Rules and Regulations taken as a whole indicates great emphasis upon the details of a retailing relationship, plus certain minimum standards of conduct applicable to all employees in the store whether they work for K-Mart or for one of the Licensees. The majority of rules apply to such things as the use of the trademark "K-Mart"; telephone listings, han-

dling of exchanges and complaints, shoplifting, lost and found problems, signs, pricing, storage, and similar matters.

However, paragraph 10 of the License Agreement permits Rules and Regulations to cover matters relating to "employment practices, personnel, and store policies." The Board seems to feel that the mere use of this clause gave K-Mart tight control over the labor policies of the Licensees. This is an unwarranted extension of the meaning of this language when it is read against the background on the other language in the License Agreement (in particular the language which specifically denies the joint employer relationship which we discussed above), and a recognition that the same paragraph 10 stated that the Rules and Regulations had to be "consistent with this License Agreement" [Vol. III, G.C. Ex. 2(c), Employer's Ex. 1, p. 4].

The extent of the Rules and Regulations themselves show what the parties intended by the quoted clause in paragraph 10 of the License Agreement. For K-Mart did exercise the right which it had reserved therein by issuing certain rules on matters relating to "employment practices, personnel, and store policies." None of these, however, in any way exercised control of matters commonly thought to be labor relations matters. These were rules establishing standards of conduct relating to loud talking, chewing gum, excessive makeup, talking with friends, and similar matters; there were rules establishing minimum standards for appearance and apparel; there were rules relating to matters of common interest to all employees in the K-Mart having to do with purses, smoking, attitude towards customers, parking of personal cars, etc. The only regulations which, by any stretch of the imagination, related to matters normally considered to be labor relations matters made it clear that the Licensees remained in charge of their own labor relations. These were:

1. *Discipline.* On page 1 of the Rules & Regulations, the subject of "Discipline" was covered. This provision limited itself to minimum standards of conduct relating to male and female employees, chewing gum, loud talking, visiting with friends, and so forth. Nothing in this section gave K-Mart the right to discipline employees of the Licensees.

2. *Hiring and Firing.* This subject was also covered on page 1, "Employment", but the right to hire and fire, certainly a fundamental of an employer's labor policies, was expressly retained in the Licensee.

3. *Labor Disputes.* This subject was covered on page 2 under the heading "General Operation of Store" in subparagraph (C) thereof where it was agreed the Licensee would "Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operation of other Licensees or Licensor." A clause like this would, of course, be expected in a License Agreement. If a labor dispute by one Licensee affected the operation of K-Mart itself and of the other Licensees, then quite obviously the labor troubles of one Licensee became the labor troubles of all Licensees—exactly the opposite of what the parties intended. So it is not surprising that a clause such as this was included. What is significant is that the language applies only to a labor dispute which "materially affects" either K-Mart itself or the other Licensees, the minimum requirement necessary to protect K-Mart and the other Licensees; even more importantly, K-Mart was not given the right to dictate the terms of any settlement, this being left to the Licensee itself.

In 1964 the Board found no joint employer relationship under virtually identical circumstances. In *Bab-Rand Co.,* 147 NLRB 247, 249, the Board said:

> "In addition, neither the contract nor the License Agreement provides for the common handling of

labor relations for the Employers' employees. To the contrary, the agreement provides that if the Licensee becomes involved in any labor difficulty as a result of which the store is threatened with being picketed the Licensor shall have the right to terminate the License Agreement upon 24 hours' written notice, given at any time after such threat is received by it or such picketing is commenced."

So it can be seen that while the Rules and Regulations do touch upon certain personnel matters in that they establish certain minimum standards of conduct and control general matters of day-to-day activity, they do not relate to labor relations matters except to make plain that these are being left under the control of the Licensees.

C. The Board's Order That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Based Upon an Erroneous Determination That K-Mart Controlled the Labor Relations Policies of Its Licensees, and Is a Conclusion Which Is Not Supported by Substantial Evidence on the Record Considered as a Whole.

The Board says that K-Mart dominated the labor relations policies of its Licensees. There is nothing in the record to support this. On the contrary the undisputed testimony as to the conduct of the parties flatly contradicts this. Rather than summarizing we think a direct quote of uncontradicted testimony will best show what the parties believed about control of labor policies of the Licensees. At the hearing before Max Steinfeld, the Hearing Officer in the underlying representation case, Mr. Sanger, Director of K-Marts for Kresge's western region, testified as follows [Vol. II-A, pp. 38-58]:

"Q. [By Mr. Tobin for K-Mart] In each of these stores [Commerce, San Fernando, Montclair,

Westminster, Santa Ana, and Cosa Mesa, California] where the particular licensees may have space and employees of their own, do these employees report to any of your supervisors? A. [By Mr. Sanger, Director of K-Marts for Kresge's western region] They do not.

Q. Do your supervisors supervise them in any way? A. They do not.

Q. Does your office in Los Angeles keep records of any of these employees of the licensees? A. We do not.

Q. Does your office in Detroit keep records of any kind of any of these employees of the licensees? A. They do not [Tr. p. 39]. . . .

Q. Do you have any records supplied to you of the names of any of the licensees in any of your stores in the ordinary course of business? A. I do not. . . .

Q. Do you have any idea of the number of employees that these licensees have? A. I have an approximate idea.

Q. And how did you obtain this estimate or approximation? A. By seeing them in the store [Tr. p. 40]. . . .

Q. Now, do the supervisors of K-Mart have any supervisory authority over the employees of the concessionaires? A. They do not.

Q. Do the supervisors of the concessionaires have any authority over the employees of K-Mart? A. They do not [Tr. p. 45].

Q. Who hires the supervisors of K-Mart? A. The manager of the particular store.

Q. Who hires the supervisors of the concessionaries, if you know? A. The concessionaries do but exactly who does it, I don't know.

Q. Who hires the employees of K-Mart? A. Through the K-Mart manager, the personnel lady hires them.

Q. Who hires the the [sic] employees of the concessionaires? A. Their supervisors.

Q. Does K-Mart in any way control who will be hired by the concessionaires? A. We do not.

Q. Can K-Mart discharge an employee of a concessionaire? A. We cannot.

Q. Who pays the unemployment compensation taxes or assessments for the employees of K-Mart? A. The Company, the S. S. Kresge Company.

Q. Who pays the workmen's compensation? A. The S. S. Kresge Company.

Q. Who pays old age assistance or any other Federal or State taxes? A. The Kresge Company.

Q. Does Kresge Company or K-Mart pay any of those aforementioned taxes or assessments for the employees of any [Tr. p. 47] concessionaire? A. They do not.

Q. Who keeps the time cards of the concessionaires? A. If they are kept, they do.

Q. Well, do you keep the time cards of any of the concessionaires? A. We do not.

Q. Who pays the payroll withholding taxes of the concessionaires' employees? A. They do.

Q. Who determines what wage an employee of the concessionaire will receive? A. They do.

Q. Who determines what hours of an employee of a concessionaire will work? A. They do.

Q. Who determines what store an employee of a concessionaire will work? A. They do.

Q. Who determines how many employees any particular concessionaire will have? A. They do.

Q. Who determines what a concessionaire will charge, what prices will be for the concessionaire's goods? A. They do. [Tr. p. 49]. . . .

Q. Who makes out the payroll checks for the employees of the concessionaires? A. The concessionaires do.

Q. Do the concessionaires have the same or different bank accounts from K-Mart? A. Different.

Q. Who handles the incoming freight for the the [sic] concessionaires? A. They do.

Q. An employee on the payroll of K-Mart, does he work at any time for any of the concessionaires? A. No.

Q. An employee on the payroll of any of the concessionaires [Tr. p. 50] mentioned, do they work on K-Mart work? A. No.

Q. You stated that you didn't know how employees of the concessionaires are assigned or where they are assigned to work or for how long. Is that correct? A. That's right. [Tr. p. 51]. . . .

Q. Where is the wage rate of the K-Mart employees determined, what source ? A. Mr. Teninga's office. [Kresge's Regional Manager, Western Region].

Q. Do you know where the wage rate of any of the employees of the concessionaires is determined? A. I do not know exactly where it is determined. I imagine it comes out of their home office.

Q. Do the employees, if you know, of the concessionaires have any benefits, fringe benefits of any type that the [Tr. p. 52] employees of K-Mart do not have ? A. They do have.

Q. Now, do the employees of K-Mart have any benefits that the employees of concessionaires do not have? A. They do have. . . .

Q. Do you have a Blue Cross plan available to your employees, K-Mart employees? A. We do have.

Q. May the employees of the licensees, concessionaires, participate in that? A. They cannot.

Q. Do you have a stock purchase plan of the K-Mart employees? A. We do have.

Q. May the employees of the licensees, concessionaires, participate in that? A. They cannot.

Q. Do you have a group insurance plan for the K-Mart [Tr. p. 53] employees? A. We do have.

Q. Do the employees of the concessionaires, licensees, participate in that? A. They cannot.

Q. Who determines the vacation periods of K-Mart employees? A. Vacation periods are set by our Detroit office through the Vice President in charge of personnel, also in Detroit.

Q. Who determines, if you know, the vacation periods of the employees of the concessionaries? A. I don't know, but I assume it comes out of their home office.

Q. The benefits, vacation benefits afforded by K-Mart to its employees are the same benefits afforded, or are they different, regarding vacations of employees of the concessionaries? A. I could not answer that because there are different vacation schedules for different licensees.

Q. Do you have anything to do with the vacation schedules of the licensees? A. I do not have.

Q. Do you have anything to do with the holiday schedules of the licensees, as to whether or not their employees are paid or whether or not they get particular days off? A. I do not have [Tr. p. 54].

Q. Does K-Mart or any of its supervisors have any authority to tell any employees of the concessionaire of the time he or she should come to work? A. No.

Q. Are there times when K-Mart employees are working that concessionaire employees are not working? A. Yes.

Q. Are the concessions in operation the same hours as the K-Mart store is in operation? A. No . . .

Q. Are there times when K-Mart is open that certain licensees do not have any employees in their particular concessions? A. Yes. . . . [Tr. p. 55].

Q. To digress just a moment, do you know the profits that are made by any of the concessionaries? Does your company know the profits made by the concessionaries? A We do not and to the best of my knowledge they do not.

Q. Meaning your company? A. Yes, sir.

Q. So as far as you know, you don't know? A. Yes.

Q. Do you know whether concessionaire employees begin in the same wage rate as K-Mart employees? A. I could not say definitely.

Q. Do you know? A. I do not know.

Q. Do you know whether the maximum rate for sales personnel is the same as yours, meaning K-Mart employees? A. It could or could not, but I wouldn't know for sure.

Q. They don't supply you information on their wages; is [Tr. p. 56] that correct? A. They do not.

Q. Do you know what experience and qualifications the employees of the concessionaires must have, if any? A. Yes. I would know there are certain departments that must have qualified help and what those qualifications would have to be—

Q. Are those greater or less or different from the qualifications and experience of employees of K-Mart? A. Is some cases it would be greater.

Q. Would it be different in some cases aside from the cases it is greater? A. Yes, it could be.

Q. Now, do you know whether the concessionaires have any supervisors who go from store to store who supervise the personnel of their

concessions? A. They do have. . . . [Tr. p. 57].

Q. When you say 'helping them run their departments,' do they have charge of the personnel of those departments? Do they supervise the personnel of those departments besides doing merchandising? A. They do.

Q. Do they handle the personnel or merchandise of more than these four stores named in this petition? A. Yes.

Q. Do they handle stores aside from K-Mart stores? [Tr. p. 58]. A. Some do and some don't.

Q. Do these—I will call them roving supervisors—do these roving supervisors check in with K-Mart? A. They do not.

Q. Are they given any directions by K-Mart? A. They are not.

Q. Do the supervisors or managers of these concessionaires who work in the stores at all times or at all times that the concessions are open, do they report to any supervisor of K-Mart? A. No.

Q. Do they report to your office? A. They do not."

This is powerful testimony. It requires no comment. None of this testimony was contradicted. None of it was impeached. No other evidence given at the hearing casts even a slight doubt on its accuracy. And yet this testimony is supposed to be a description of a Licensor controlling and dominating the labor relations policies of its Licensees. It actually shows that K-Mart was almost indifferent to the labor relations policies of its Licensees except for the minimum standards of conduct expected of everyone.

The Board ignored this testimony completely.

D. The Conclusion of the Board and Its Regional Director That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Erroneously Based Upon Facts Not in the Present Record and Is the Result of Improper Conclusions Not Supported by the Record in This Proceeding; and It Represents the Abandonment of a Long Standing and Sound Basis for Determining Joint Employer Cases in Retail Establishments and the Adoption of an Unsound Basis Without Articulating the Reasons for the Change in Policy.

The outcome of this case at the Board level was surprising. For the determination that K-Mart and its Licensees must bargain as "joint employers" ignored the written terms of the License Agreement signed by the parties and actually rewrote the Agreement; it distorted the terms of the Rules and Regulations which were issued pursuant to the License Agreement and overlooked those terms which clearly and specifically left all segments of the Licensees' labor relations policies under the control of the Licensees; it totally ignored the undisputed testimony given at the hearing below which showed that K-Mart not only did not dominate or control the labor relations policies of the Licensees, but virtually ignored them. In addition, the Regional Director and the Board apparently applied (we cannot be sure because the Board has never told us) an improper and unsound rule of collective bargaining which seems to be applicable to all Licensor-Licensees relationships in the retail field, namely, that if the Licensor and Licensees hold themselves out to the public as a single enterprise then they must bargain jointly with a union.

To understand this result we must first review the somewhat unusual legal path that this case took and

the circumstances under which a determination was erroneously made that K-Mart dominated the labor relations policies of its Licensees. And we must then trace the changing attitude and philosophy of the Board in retail Licensor-Licensee cases and its sudden change from a sound rule to an artificial and improper rule, a change for which no clear and articulate reason has yet been given.

1. The Conclusion of the Board and Its Regional Director That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Is Erroneously Based Upon Facts Not in the Record and Is the Result of Improper Conclusions Not Supported by the Record in This Proceeding.

Let us first consider the somewhat unique situation under which K-Mart and its Licensees find themselves required to bargain with a union as "joint employers".

The genesis of the Board's final determination in this case was a prior case involving a 1963 union election at the Commerce K-Mart. The Retail Clerks on February 21, 1963, petitioned for an election in the Southern California K-Marts then consisting of the stores in San Fernando and Commerce (21-RC-8194). The Decision and Direction of Election was made on May 6, 1963 by Ralph E. Kennedy, Regional Director for the 21st Region. He ruled that "each of the Licensees and the K-Mart are the joint employers of the employees in each of their respective departments." He accordingly determined on an appropriate bargaining unit consisting of K-Mart employees and employees of the various Licensees.

An analysis of the Regional Director's reasons for the joint employer finding is interesting. He first emphasizes the common appearance of the operation to the public and the K-Mart control of certain phases of the retailing operations in this language:

> "The appearance of a single department store is preserved through these license agreements by which K-Mart retains control over all advertising, retains the right to audit the records of the licensee retains control over the physical layout of the store, and handles all complaints, exchanges and refunds through its service desk. The license agreement also prohibits the display of the trade names of the individual licensees. There is no physical participation of departments. All merchandise is registered at a central checkout area on K-Mart registers and wrapped in similar wrapping material furnished by K-Mart. All credit must be approved by K-Mart."

Note that this language doesn't say a single thing about K-Mart's control of Licensees' labor relations or even of routine personnel matters.

The Regional Director then did comment briefly upon matters that involve personnel policies when he said this:

> "Moreover, and in furtherance of K-Mart's intention of creating the appearance of a single integrated store, the licensee agrees to keep open during the hours established by K-Mart. Under the license agreements, K-Mart can make rules and regulations governing employment practices, personnel and store policies. All employees punch the same time clock."

The first sentence refers only to the hours that the Licensee must keep the counters open. There was no finding made as to the hours worked by the employees.

The second sentence is almost a quote from paragraph 10 of the License Agreement. Here, admittedly, K-Mart retained the right to issue Rules and Regulations "consistent with this License Agreement" and which could cover, among other things, "employment practices, personnel, and store policies"; but we have already analyzed the License Agreement and the Rules and Regula-

tions and have shown that this particular phrase, particularly when read in the context of the remaining provisions of both the License Agreement and the Rules and Regulations, does not give K-Mart control of the labor relations policies of any Licensee.

The Regional Director then concluded by commenting that all employees punch the same time clock. We fail to see how punching the same time clock indicates that K-Mart controls the labor relations of its Licensees. The undisputed testimony at the hearing in the instant case was that K-Mart has nothing to do with the time cards of the Licensee employees; Mr. Sanger, Director of K-Marts for Kresge's western region, testified as follows:

> "Q. Who keeps the time cards of the concessionaires? A. If they are kept, they do.
>
> Q. Well, do you keep the time cards of any of the concessionaires? A. We do not." [Vol. II-A, p. 47].

The Regional Director, having recited at length a series of irrelevant and erroneous reasons for finding that K-Mart controlled the labor relations policies of the Licensees, then cited three cases which do not apply to this situation. In his footnote 3 he cited: *Spartan Department Stores,* 140 NLRB No. 59; *Frostco Super Save Stores, Inc.,* 138 NLRB No. 14; and *United Stores of America,* 138 NLRB No. 45. As with the Regional Director's logic, these bear examination.

In *Spartan Department Stores, supra,* [now cited 140 NLRB 608 (1963)] the License Agreement specifically subjected all employees of all Licensees to all labor relations policies set by the Licensor, authorized the Licensor to discharge employees of the Licensees, authorized the Licensor to adjust any labor dispute involving a Licensee, and required the Licensees to comply with the terms and conditions of employment, hours,

vacation policy, collective bargaining, and union affiliation, as established by the Licensor. No such control exists at the Commerce K-Mart.

In *Frostco Super Save Stores, Inc.* [now cited 138 NLRB 125 (1962)] the License Agreement specifically provided that Licensor was to be present at and participate in labor contract negotiations, and further provided that Licensor held the power over the execution of any labor contract by the Licensee. No such control exists at the Commerce K-Mart.

In *United Stores of America* [now cited 138 NLRB 383 (1962)] the License Agreement specifically covered the subject of labor relations and provided that no Licensee could negotiate with any labor organization without the written consent of Licensor and, in addition, Licensor was authorized to discharge employees of the Licensee. No such control exists at the Commerce K-Mart.

With this decision of the Regional Director of May 6, 1963, based as it was upon fallacious reasoning and Board precedent which wasn't controlling, the error commenced. It was compounded in later proceedings.

It happened that sometime prior to this, about December 20, 1962, S. S. Kresge Company had decided that employees of its K-Mart Division should be paid time and one-half for Sunday work. This was not immediately applied in the K-Marts in California for a variety of legitimate business reasons. On April 21, 1963—about a month and a half before the first election in the Commerce K-Mart—this Sunday pay policy was put into effect at the Commerce K-Mart by Kresge. Mr. Smith, who was the manager of the K-Mart and an employee of S. S. Kresge Company, had posted a notice on the employees' bulletin board on April 16, 1963, advising of the pending institution of premium pay for Sunday work. At that time he also mentioned this to

Mr. Owens, who was manager of the shoe licensee and suggested to Owens that he should contact his superiors to see whether the licensee would like to pay the same Sunday rate. Owens did contact his superiors and they determined to go along with the Kresge policy. As a result the shoe department employees were first paid Sunday premium pay for their work on May 26, 1963, a date ten days before the union election.

On June 5, 1963, the Board election was held and the union lost. The union then filed objections to the conduct of K-Mart and of the shoe department licensee prior to the election, their Objection No. 1, referring to the institution by both of them of Sunday premium pay at a time shortly before the election. The Regional Director overruled all of the union's objections except for objection No. 1.

After certain legal proceedings not here relevant, a hearing was held between November 4 and November 26, 1963, before Hearing Officer Howard D. Fabrick. This hearing, of course, was not to go into the question of the appropriate unit but merely to determine whether the institution of Sunday premium pay by either K-Mart or the shoe department licensee interfered with a free election. Mr. Fabrick found that, because the original determination of S. S. Kresge Company to institute premium pay had been made in 1962 and the delays in announcing it and putting it into effect at the Commerce K-Mart were based upon legitimate business reasons, K-Mart's institution of this premium pay was not grounds for setting aside the election. However, he ruled that these excuses did not apply to the shoe department licensee and accordingly recommended that the election be set aside on the grounds that the institution of Sunday premium pay came during the "critical period before the election" and therefore was improper. Exceptions were filed by K-Mart asd

the shoe department licensee and the matter was submitted to the Board for determination.

On June 24, 1964, the Board overruled the union's objection No. 1 in its entirety and certified the result of the June 5, 1963 election. This decision, Case 21-RC-8194, is unpublished. The Board found that because K-Mart and the shoe licensee were "joint employers" K-Mart's institution of Sunday premium pay was also the shoe licensee's, which made the latter's activities proper.

The reasoning of the Board, as with the language and reasoning of the Regional Director, bears some analysis. It must be remembered that the Board issued its Opinion, not in a proceeding which was to determine the appropriate bargaining unit, but in connection with overruling union objections to an unsuccessful union election.

In this decision the Board first of all noted that Smith, K-Mart's manager, had talked to Owens, the shoe department manager, about the raise at the time that Smith first posted the notice for the benefit of K-Mart employees on April 16, 1963, saying:

> "On the same day Smith advised Owens, manager of the licensed shoe department, that he should contact his superior about paying the same rate to employees within the latter department for Sunday work. The record further shows that Owens agreed to do so, and had several later conversations with Smith about the matter."

This quoted language said in slightly different form what the Hearing Officer, Fabrick, had found when he said in his Recommendation: "Smith testified that on or about April 16, 1963, he told Owens about Teninga's (the Western Regional Manager of S. S. Kresge) directive and suggested that Owens contact his superiors with respect to his personnel."

Secondly, the Board, as with its Regional Director continued to emphasize the common retailing characterisics of the Commerce K-Mart and, interestingly enough, paid even less attention to the question as to whether K-Mart controlled the labor relations policies of the Licensees than had its Regional Director, the Board first stating:

> "As found by the Regional Director in his Decision and Direction of Election, the City of Commerce store here involved is operated as a single, integrated department store by K-Mart, a Kresge subsidiary, and the several licensees pursuant to substantially uniform agreements with K-Mart. Under these agreements, K-Mart preserved the appearance of a single department store, without any reference whatever to the trade names of the individual licensees. It controlled all advertising and the physical store layout, and handled all complaints, exchanges and refunds through its service desk. All merchandise was registered at a central check-out area on K-Mart registers and wrapped in K-Mart paper. K-Mart retained the right to audit the records of the licensees and approved all extensions of credit."

This says nothing about control of labor relations policies.

The only comment that the Board made having to do with either labor relations or personnel policies was contained in the single sentence, which reads:

> "Under the agreement, K-Mart had the power to make rules and regulations governing employment practices, personnel, and store policies."

And all this does is paraphrase a portion of paragraph 10 of the License Agreement between the parties. Note that there is no analysis of the License Agreement or the Rules and Regulations. There is no comment from

the Board about the provisions therein that the hiring and firing of Licensee employees was retained by the Licensee, nor any comment about the labor disputes clause which the Board had only recently found so significant in *S.A.G.E. Inc. of Houston, supra,* nor any review of the matters typically considered to be labor relations policies and which were not covered, such as the Board had so recently and ably done in *Bab-Rand Co., supra.* The Board's Opinion avoided one mistake of its Regional Director's Decision, it did not cite inapplicable Board precedent; in fact it did not cite any authority whatsoever.

Nor did the Board in the course of its Opinion find any facts relating to the contracts between Smith, manager of the Commerce K-Mart and Owens, manager of the licensee shoe department upon which it could base a determination of labor relations control. They merely commented in passing that Smith "advised" (the Hearing Officer had said he "suggested") Owens, manager of the licensed shoe department to contact his superiors. The Board made no finding, as its Regional Director had made no finding, that Smith ordered, or directed, or pressured, or even strongly urged, Owens to contact his Licensee employer. Nor did the Board find, any more than its Regional Director had found, that the decision of the shoe department licensee was anything but an independent decision made by an independent business organization. The record is free of any evidence of control or strong influence or pressure by K-Mart upon the shoe department licensee in making this decision.

About six months after the above Board decision the Retail Clerks Union filed its instant petition for election in the Commerce, California store (21-RC-9309) and also had pending petitions for election in the San Fernando, Santa Ana, and Westminster, California K-Marts which were by that time all in operation. The

four petitions for elections in the four K-Marts were consolidated for hearing on January 18 and January 19, 1965 before Hearing Officer Max Steinfeld. At this time K-Mart took the position, as it had taken in the 1963 election, that the appropriate unit should consist only of K-Mart employees and should not include Licensee employees—this on the basis that it was not a joint employer with the Licensees and did not control their labor relations. The union, as it had in the 1963 election, took the position that the appropriate bargaining unit should consist of both K-Mart and Licensee employees.

Following the hearing, the matter was presented to Regional Director Kennedy, for a determination of the appropriate unit—the same Regional Director who had decided the 1963 election. Here the original error was compounded. For on February 24, 1965 he issued his Decision and Direction of Election in the Westminster case (21-RC-9128), the Santa Ana case (21-RC-9130) and the Commerce case (21-RC-9309). He again found that K-Mart and its Licensees were "joint employers" in the following language:

> "The licensed departments are integrated into the general operations of the stores and are unidentifiable. Under the license agreements, K-Mart retains control over advertising and merchandise, retains the right to audit the records of the licensees, retains control over the physical layout of the store and handles all complaints, exchanges and refunds through its service desk. All credit is approved by K-Mart. In addition, the licenses require the licensees to comply with rules and regulations which the licensor promulgates. They may cover such subjects as employment practices, personnel and store policies, and pricing of merchandise. The rules and regulations now in effect between K-Mart and each licensee allow K-Mart to take applications of per-

sons desiring employment with the licensees and require the licensor and the licensee to check with each other before hiring a present employee or former employee of the other. Under these rules and regulations, the licensee agrees to operate its department during hours established by the licensor and not to continue a labor dispute which materially affects the sales or operations of other licensees or the licensor, and employees of the licensees are required to attend sales and training meetings.

"In view of the above, I find that each of the foregoing licensees and K-Mart are joint employers of the employees in each of their respective departments. In a Decision and Direction of Election dated May 6, 1963, in *K-Mart, a Division of S. S. Kresge Company,* Case No. 21-RC-8194 (unreported), I made a similar finding. Nothing presented in the instant case compels a different finding. Cf. *Frostco Super Save Stores, Inc.* 138 NLRB 125; *Spartan Department Stores,* 140 NLRB 608." [Vol. III, G.C. Ex. 5(a)].

If this language is put alongside the Regional Director's language in his original Decision and Direction of Election, dated May 6, 1963, at the time of the first election at the Commerce K-Mart (21-RC-8194) it will be seen that it is a virtual restatement of his earlier comments with a few additions which apparently were designed to bolster his weak reasoning. He really has added only two comments: (1) the fact that the Rules and Regulations "allowed K-Mart to take applications of persons desiring employment with the Licensees and required the Licensor and Licensee to check with each other before hiring a present employee or former employee of the other" and (2) that "* * * employees of the Licensees are required to attend sales and training meetings."

As to his first comment, the precise language respecting employment and employment applications appears on page 1 of the Rules and Regulations and consists of the second and third paragraphs of the section headed "Employment". These paragraphs read:

> "The K-Mart personnel supervisor will take applications of persons desiring employment. Upon request, these applications will be made available to Licensee's manager."
>
> "Neither Licensor nor Licensee will hire an employee or former employee of the other without first checking with Licensor or Licensee." [Vol. III, G.C. Ex. 2(c) Employer's Ex. 2, p. 1].

What the Regional Director, inadvertently or otherwise, failed to note was the first paragraph under that same heading which specifically reserves to the Licensees the right to do their own hiring and firing. This paragraph reads:

> "All hiring and terminations, so far as they apply to each Licensee, will be under the supervision of the Licensee's manager."

With respect to his second new comment, namely, that Licensees' employees are required to attend sales and training meetings, we concede there is a sentence on page 3 which reads:

> "Licensee's employees shall attend briefing and training sessions to familiarize themselves with store policies and regulations pertaining to the conduct of the business in their department, as well as the entire operation." [Vol. III, G.C. Ex. 2(c), Employer's Ex. 2, p. 3].

Language of this sort is hardly surprising in a retail operation such as a K-Mart and quite obviously is aimed at familiarizing all employees of all merchants in K-Marts with certain business practices and requirements.

It hardly is an attempt by K-Mart to control the labor relations policies of a Licensee. The Regional Director again overlooked the entire tenor of the License Agreement and of the Rules and Regulations, did not even comment on the various positive statements in the License Agreement which showed that labor relations control was left to the individual Licensee, and seemed to be motivated mostly by his 1963 decision.

There was perhaps one slight improvement in the 1965 Opinion over the 1963 Opinion: this time he only cited two inapplicable Board cases as precedent, rather than three, noting *Frostco Super Save Stores, Inc. supra,* and *Spartan Department Stores, supra,* but omitting *United Stores of America, supra.*

In addition, each of the criticisms we have made previously about the 1963 Opinion could be repeated with respect to the 1965 Opinion of the Regional Director.

K-Mart, as it had consistently done, disagreed vigorously with Regional Director Kennedy that it dominated the labor relations policies of its Licensees and therefore should be forced to bargain jointly with them, and on March 5, 1965, filed a Request for Review of the Regional Director's Decision. The Board refused to grant this Request for Review.

On April 7, 1965, the election was conducted and the union "won", 38 to 37. K-Mart refused the union's request to bargain based upon, among other reasons, its disagreement with the finding of the appropriate unit. In the course of the unfair labor practice hearing (based upon the refusal to bargain) which ensued, K-Mart attempted to reopen the subject of the appropriate unit but the Board refused on the grounds that it had been fully litigated prior to the election. It was from the Board's finding of K-Mart's alleged unfair labor practice in refusing to meet with the union that this appeal was taken.

2. **The Conclusion of the Board and Its Regional Director That K-Mart Should Be Forced Against Its Will to Bargain as a Joint Employer With Its Licensees Represents the Abandonment of a Long Standing and Sound Basis for Determining Joint Employer Cases in Retail Establishments and the Adoption of an Unsound Basis Without Articulating the Reasons for the Change in Policy.**

The Regional Director, and the Board have repeatedly emphasized that K-Mart appears to the public to be one enterprise operated by one merchant and used this as a basis for the conclusion that K-Mart exercises control over the labor relations policies of its Licensees. We consider this a remarkable *non sequitur*. And yet in the recent case of *Thriftown, Inc.* 161 NLRB No. 42 (1966) the Board appears to be adopting such a rule so that in retail establishments like K-Mart it will make a finding of a joint employer relationship no matter what the License Agreement says or the conduct of the parties shows. The Board in this case determined that there was a joint employer relationship so patently ignoring the precedent contained in such cases as *S.A.G.E. Inc., Bab-Rand Co.,* and *Esgro Anaheim, Inc., supra,* that one is forced to the conclusion that the real, though unstated, reason for its decision is the application of this new philosophy expounded in *Thriftown, Inc.* It is our belief that the philosophy expressed in *Thriftown* is unsound, the reasons for the change in the philosophy of the Board have not been properly articulated as required by the Supreme Court and serious constitutional questions have been raised by the application of this new philosophy.

Here is the history of the Board's policies in this area. For many years the Board had a well reasoned and well defined policy for determining that a joint employer relationship existed. Typical examples are:

Atlantic Mills Serving Corp., 117 NLRB 65 (1957); *Erlanger Dry Goods Co.,* 107 NLRB 23 (1953); *Block & Kuhl Dept. Store,* 83 NLRB 418 (1949).

The Board put the rule this way: "* * * the question as to whether the lessor or lessee is the employer of leased department employees in this type of case is determined by which of the two *has the primary right of control over matters fundamental to the employment relationship." Duanes Miami Corporation,* 119 NLRB 1331, 1334 (1958). (Emphasis supplied).

And underlying this rule was the policy long held by the Board as to what constitutes the essentials of an employer-employee relationship.

> "The decisive elements in establishing an employer-employee relationship are complete control over the hiring, discharge, discipline and promotion of employees, rates of pay, supervision and determination of policy matters." *Roane-Anderson,* 95 NLRB 1501, 1503 (1951).

The Circuit Courts of Appeal repeatedly approved these criteria for determining the existence of an employer-employee relationship. See *Continental Bus System, Inc. v. NLBR,* 325 F. 2d 267 (10th Cir. 1963); *NLRB v. Howard Johnson,* 317 F. 2d 1 (3rd Cir. 1963) (quoting with approval the language from *Roane-Anderson, supra,* which we have set forth above); *Site Oil Co. v. NLRB,* 319 F. 2d 86 (8th Cir. 1963), *NLRB v. Condensor Corporation,* 128 F. 2d 67 (3rd Cir. 1942) and cases there cited.

The Board doctrine received its most precise delineation in a series of Board cases in 1964: *S.A.G.E. Inc.,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964) and *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964).

In *S.A.G.E. Inc., supra,* while the License Agreement there involved was not set out in full, the Board gives

a detailed description of it at pages 326 and 327, and it has every appearance of being closely identical in substance to the K-Mart License Agreement. Much of the control of the *retail* activities was retained by *S.A.G.E.* just as K-Mart does, and the Board said at page 327:

> "The current effect of License Agreements is to create the impression among store customers that they are dealing with a single company and not with individual enterprises sharing space in a single store building."

But the Board then went on to point out:

> "Although S.A.G.E. exercises close control over the operational policies of the licensees, it does not exercise similar control over the labor policies of the latter. Each licensee hires, discharges, and disciplines the employees in his department, determines their wage rates and other monetary benefits, and establishes their working conditions. Each licensee also lists the employees in the department on his own payroll and makes the standard payroll deductions for such items as social security and income tax withholding. The license agreement specifically provides that neither party shall hold itself out to be or act as the agent, servant, or employee of the other and that the relationship between the two parties shall be only that of licensor and licensee."

Shortly thereafter in *Bab-Rand Co., supra,* which involved the White Front Stores, Inc., a chain of retail operations on the west coast, the Board cited and reaffirmed the principles of *S.A.G.E.,* and the reasoning behind those principles, stating at page 249:

> "The record clearly establishes, and we find, that White Front and the Employer are not joint employers. Thus, the license agreement executed by them specifically provided that 'this agreement is not intended to create and shall not be considered

as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee. . . .' In addition, neither the contract nor the license agreement provides for the common handling of labor relations for the Employer's employees. To the contrary, the agreement provides that if the licensee becomes involved in any labor difficulty as a result of which the store is threatened with being picketed, the licensor shall have the right to terminate the license agreement upon 24 hours' written notice, given at any time after such threat is received by it or such picketing is commenced. Further, the Employer hires and discharges the snackbar employees and sets their wage rates; there is no interchange of snackbar employees with any White Front employees; and their seniority is separate from that of White Front employees. The fact that the Employer's employees have certain working conditions in common with the employees of White Front is due to the fact that the operations of both employers are housed in the same stores, and does not arise from the license agreement."

Later in the same year, 1964, the Board continued its adherence to the policies enunciated in *S.A.G.E.* and *Bab-Rand Co.,* in the case of *Esgro Anaheim, Inc., supra.* Again a White Front store was involved. Beginning at page 404 the Board said this about the relationship of White Front and its licensee:

"As to these matters, the record shows that Esgro does, in fact, hire and discharge its own employees, and sets their wage rates. Esgro also determines their work and vacation schedules. Without consultation with White Front, it grants fringe benefits, which are available only to its employees, and which do not arise from either the contract or license

agreement. There is no interchange of Esgro's employees with any White Front employees, or those of other licensees, and the contract provides that their seniority is to be separate from that of White Front employees. Such control as White Front exercises over Esgro's operations appears to be limited to the extent necessary for efficient operation of the White Front stores and to give the appearance to the public of one integrated retail operation. The license agreement further provides that 'this agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee. . . .' Neither the contract nor the license agreement provides for the common handling of labor relations for Esgro's employees, and there is no evidence to show that such joint control was contemplated. While the Retail Clerks points out articles of the license agreement governing the operation of the licensee's department as an integral department of the store, it has not shown that White Front has exercised control over Esgro's employees so as to affect their working conditions or tenure of employment. Nor has any evidence been produced to show that White Front has ever had any part in settling grievances of Esgro's employees."

The applicability of these cases to the Commerce K-Mart factual situation becomes even more striking if the License Agreement and Rules and Regulations used by White Front and its licensees are studied in detail. Quite obviously White Front exercised a great deal tighter control over its licensees than did K-Mart [See the License Agreement, Vol. III, G.C. Ex. 6, pp. 21-22; and the Rules and Regulations, G.C. Ex. 6, Appendix "C"].

We think it beyond argument that if the Board had followed *S.A.G.E., Bab-Rand* and *Esgro* in the instant case it would not and could not have found a joint employer relationship.

It was in the *Esgro* case that, for the first time, a dissent was noted to the Board policy with respect to licensor-licensee situations in department stores. Members Brown and Jenkins dissented, saying at page 409:

> "The record thus discloses a retail leased department operation of a type which has become a commonplace method of conducting a department store business. Generally speaking, the lessor establishes the store and holds himself out to the public as the sole entrepreneur, whereas in fact some or all of the departments are operated by lessees who assume some of the risk."

These two Board members then concluded, even though they had made no finding that the licensor, White Front, dominated or controlled the labor policies of the licensees, that White Front and its licensees should be required to bargain as joint employers. The *non sequitur* had finally appeared. Because the public thinks there is only one merchant, all the merchants in the store must bargain as one. Nothing is said about the problems that this philosophy could create at the bargaining table. Nothing is said about the impairment of the contract between the licensor and the licensees. These same two Board members also dissented in *Triumph Sales, Inc.*, 154 NLRB 916 (1965) when the majority continued to follow the traditional philosophy.

Finally, in *Thriftown, Inc.*, 161 NLRB No. 44 (1966), the minority view became the majority view of the Board. The majority recited at length the contractual relationship between the parties in Thriftown, a subsidiary of the Kroger Company, finding, among other things, that licensees controlled their own labor relations in such matters as hiring, firing and disci-

plining employees, determining wages, rates of pay, and other benefits, etc. They then made the statement, after commenting that a strike against one licensee will "almost necessarily adversely affect the operation of the entire store":

> "It follows, therefore that the owner of the discount store, *in some manner* will retain sufficient control over the operations of each department so that it will be in a position to take those steps necessary to remove the causes for the disruption in store operations." (Emphasis supplied).

A truly astounding statement. Apparently the Board is going to find that the Licensors always have "in some manner" retained control of the labor policies of the licensees no matter what the License Agreement says, and no matter what the conduct of the parties may indicate. It is this reasoning and logic which permeates the instant case. It is this reasoning and logic to which K-Mart takes vigorous exception.

A withering dissent was filed by two members of the Board, which is so powerful and so well put, that K-Mart adopts it in its entirety and attaches it hereto as Appendix "A".

For the convenience of the court we have prepared and attached to this brief as Appendix "B" a chart of the principal retail Licensor-Licensee cases decided by the Board. The chart indicates the criteria which the Board has considered relevant in each case listed, with respect to a determination on the joint-employer question. It can readily be seen from this chart that the Board, commencing with the instant case, but more clearly articulated in Thriftown, has shifted from the long-established rule that a joint-employer finding can only be substantiated by a showing of control over labor relations and has, in this case, and subsequently, based its decision upon appearances to the public. Significantly, the chart also illustrates that at the time S. S.

Kresge drafted the License Agreement in issue in the case at bar, under existing and well established case law, the Board would not have found a joint-employer relationship.

The Board in *Thriftown,* as well as in this case, abruptly changed its long established rule relating to licensors and licensees without clearly articulating the reasons for the sudden change. This failure on the part of the Board violates the requirement imposed on it by the Supreme Court in *NLRB v. Metropolitan Life Insurance Company,* 380 U.S. 438 (1965) and similar cases, such as *NLRB v. Tallahassee Coca-Cola Bottling Co. Inc.,* .... F. 2d ...., 5th Cir., August 8, 1967. It is submitted that the failure of the Board to articulate its reasoning is because such reasoning is contrary to the dictates and policy of the Act.

The underlying flaw in the Board's order and the philosophy behind it, as exemplified in both the instant and *Thriftown* cases, lies in the fact that its enforcement would create several serious and perplexing, indeed insoluble, problems. There can be no question, we submit, that the Board has, *sub silentio,* overruled the *Sage, Inc., Bab-Rand Co.,* and *Esgro Anaheim* line of cases. In so doing, the Board has apparently made it impossible in the discount operation field for K-Mart and others similarly situated to draft a license agreement which will prevent a Board determination that they are joint employers with their licensees. The Board has no right to establish a rule of law which effectively precludes a separate employer relationship in this area of commerce when one is desired and intended by the parties. Such is the case here.

The Board's action is particularly aggravating in that K-Mart has taken every possible measure to maintain an independent relationship vis-a-vis its licensees and prepared and executed the license agreement in question prior to the change of philosophy manifested in this

case and thereafter in *Thriftown*. When this case is stripped to its essentials, there is no question but that the Board was strongly influenced by the fact that K-Mart and its licensees present the appearance of an integrated operation to the public.

We urge that such a policy unconstitutionally impairs K-Mart's freedom of contract, totally disregards the intent of the parties to the license agreement, and deprives them of due process protections. The Board's order is, therefore, violative of the record, intentions of the parties, statutory law, logic and constitutional safeguards.

E. The Board Erroneously and Improperly Certified the Union as Bargaining Representative When, in Fact, Its Election "Victory" Was the Direct Result of Threats, Coercion and Misrepresentation.

Preliminary Statement.

Another critical error committed by the Board in the instant case was its certification of the Union as bargaining representative for employees of K-Mart and its licensees despite conclusive evidence that the Union had, during its pre-election campaign, threatened, coerced and intimidated employees in the bargaining unit and had further induced votes by means of material misrepresentations of fact and law. A summary of the record with respect to Union campaign activity demonstrates that the Union's illegal conduct impaired employee free choice and upset those "laboratory conditions" without which no election can be said to have truly reflected employee sentiment.

Following the election in the underlying representation case, No. 21-RC-9309, held on April 7, 1965, which the Union "won" by a single vote—38-37, K-Mart filed timely objections to the election, together with a Memorandum of Points and Authorities in Sup-

port thereof [Vol. III, G.C. Ex. 16; 21]. These objections, six in number, were directed at a broad range of electioneering violations attributable to the Union.

Thus, K-Mart alleged that during the months of March and April 1965, Union agents had coerced and intimidated K-Mart employees by threatening loss of jobs if they did not join or support the Union [Vol. III, G.C. Ex. 16, Objection 1]; that during those same months in 1965, Union agents threatened K-Mart employees with physical and other reprisals and engaged in constant surveillance of their activities, thereby creating an atmosphere of fear, prejudicially affecting the election [Vol. III, G.C. Ex. 16, Objection 2]; that Union representatives engaged in a planned scheme of misrepresentation, including distributing a leaflet to K-Mart employees containing deliberately false and misleading statements of wage comparisons between K-Mart and unionized stores (Objection 3); that false representations were made concerning payment of Union dues (Objection 4); that on election day, false and misleading statements of fact and law were made to one or more K-Mart employees (Objection 6); and finally, that the Union engaged in wrongful and deliberate inducements for votes by waiving Union initiation fees contingent on the outcome of the election (Objection 5).

In support of the foregoing objections K-Mart offered documentary evidence [Vol. III, G.C. Ex. 21, Exs. G, H, I, J and K] as well as the affidavits of Williams, Crabtree, Bloomfield, Cooper, Castanon, Reyes and Platteborze, individuals employed at the K-Mart store [Vol. III, G.C Ex. 21, Exs. A, B, C, D, E, F and L].

On June 30, 1965, the Board's Regional Director issued his Supplemental Decision sustaining K-Mart's

Objection 3, outlined above, but overruling, out of hand, all of the remaining objections raised [Vol. III, G.C. Ex. 28(a)]. Subsequently, the Board granted the Union's Request for Review, denied K-Mart's Request for Review [Vol. III, G.C. Ex. 35] overruled the Regional Director with regard to Objection 3, and certified the Union [Vol. III, G.C. Ex. 40].

It is to be noted that the position taken by the Regional Director on Objections 1, 2 and 6 was far different from that taken by the Board on review of those very same objections. The Regional Director agreed that the listed violations, if proved true, were substantial and material, clearly warranting the setting aside of the election. He overruled the enumerated objections simply because *he did not believe the accuracy of the allegations of K-Mart's witnesses as set forth in their affidavits.* That the Regional Director made credibility findings is both undisputed and indisputable. For example, in support of Objection 6, K-Mart offered the affidavit and handwritten notes of employee Platteborze, evidencing gross misrepresentations made on election day by a Union agent in response to her questions [Vol. III, G.C. Ex. 21, Ex. L]. In disposing of this objection, the Regional Director stated:

> *"The answers, as the employee wrote them down, do contain misstatements concerning legal rights of employees and the Petitioner's (Union's) engagements in strikes in the past.* The union representatives denied making the misrepresentations attributed to them. *I credit their denial,"*[5] [Vol. III, G.C. Ex. 28(a), p. 9] (Emphasis added).

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[5]Similar credibility findings were made by the Regional Director with respect to Objections 1 and 2. In each instance allegations of K-Mart witnesses that they, or other employees, were threatened, coerced and intimidated by Union agents were disbelieved solely because those allegations were denied by others [Vol. III, G.C. Ex. 28(a), pp. 5-6].

Yet at no time did the Regional Director, or the Board, see fit to direct a hearing for the purpose of resolving these conflicts in testimony, as required by due process of law and the Board's own Rules and Regulations (See Sec. 102.69(c), (d)). Findings of Fact were made by the Regional Director *ex parte,* based solely on the affidavits attached to K-Mart's Memorandum and on the Regional Director's private investigation. No opportunity has ever been afforded K-Mart to present its witnesses in person or to conduct cross-examination of adverse witnesses. There can be no doubt under the law that the unilateral action of the Regional Director constituted a clear abuse of discretion and denied to K-Mart even minimum standards necessary to insure procedural due process.[6]

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[6]As will be demonstrated in more detail *infra,* K-Mart's objections raised substantial and material issues of fact, which, if given credence, would clearly have invalidated the election. Under such circumstances it has been deemed imperative that a hearing be conducted at some stage of the administrative proceeding before the objecting party's rights can be affected by an enforcement order. *NLRB v. Bata Shoe Co. Inc.,* 377 F. 2d 821 (4th Cir. 1967), and cases there cited.

A solid line of court authority supporting this proposition has been cited by K-Mart at every turn but completely disregarded by the Board. A review of the cases shows how firmly K-Mart's right to a hearing has been established. For example, *NLRB v. Poinsett Lumber & Mfg. Co.,* 221 F. 2d 121 (4th Cir. 1955) is virtually indistinguishable from the case at bar. There, too, an employer raised substantial questions relating to Union threats and intimidations, by way of objections to an election. Nonetheless, the Union was certified after an *ex parte* investigation and the employer, as here, was deprived of a right to a hearing. The Court concluded that the employer had not received the full and fair hearing before the Board guaranteed him by law and remanded the case with direction to hear the evidence offered by the Company bearing on the validity of the election.

Similar reasoning is found in the opinions of many circuits. See, for example, *NLRB v. Lord Baltimore Press, Inc.,* 300 F. 2d 671 (4th Cir. 1962); *NLRB v. Joclin Mfg. Co.,* 314 F. 2d 627 (2d Cir. 1963); *NLRB v. Sidran,* 181 F. 2d 671 (5th Cir. 1950); *NLRB v. Dallas City Packing Co.,* 230 F. 2d 708

The Board's approval of this "star chamber" procedure has been continuously challenged throughout this case. On July 12, 1965, K-Mart filed its Exceptions to and Request for Review, in part, of the Regional Director's Supplemental Decision [Vol. III, G.C. Ex. 32], and urged that since it had not been granted a hearing as to vital issues upon which a conflict of evidence was apparent the Board should resolve the matter by directing such a hearing [Vol. III, G.C. Ex. 32, pp. 7-9; 10-11; 25-27]. The Board denied this Request for Review by telegram on July 21, 1965 [Vol. III, G.C. Ex. 35].

Again, during the hearing before the Trial Examiner, K-Mart, in timely fashion, raised its failure to receive a hearing on objections to the election as a ground of defense to the refusal to bargain levied by the Union [Vol. II, Tr. 13, lines 17-25]. Indeed, the General Counsel conceded that K-Mart had never received a hearing and alluded to the numerous briefs filed by K-Mart in [Vol. II, Tr. 22, lines 3-16]. Nonetheless, the Trial Examiner, allegedly adhering to Board policy, refused to consider at all the validity of K-Mart's objections to the election in view of the prior Board ruling on these objections in the representation case [Vol. I, p. 308]. Finally, on review to the Board from the Trial Examiner's decision, K-Mart once again urged in its brief as prejudicial error the denial, at all stages of this proceeding, of its right to present witnesses and to have their credibility determined in a hearing as required by due process of law.

At the end of this odyssey and apparently as a response to the controlling authority cited by K-Mart con-

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(5th Cir. 1956); *NLRB v. Staub Cleaners*, 357 F. 2d 1 (2d Cir. 1966); *NLRB v. Capital Bakers*, 351 F. 2d 45 (3rd Cir. 1965); *U.S. Rubber Co. v. NLRB*, 373 F. 2d 602 (5th Cir. 1967); *Home Town Foods, Inc., v. NLRB*, ... F. 2d ..... (5th Cir. 1967) Daily Labor Report No. 128, BNA July 3, 1967.

firming its legal right to a hearing at *some* stage of the case, the Board has taken the position, in its Decision [Vol. I, pp. 324-25] that no hearing was required because the Union's conduct was insufficient to warrant setting aside the election, *even assuming that such conduct occurred precisely as K-Mart witnesses alleged.*[7]

Like the man who has painted himself into a corner, the Board had two choices, neither very palatable: one was to repaint the floor (*i.e.,* belatedly direct a hearing), the other was to break down the wall (*i.e.,* ignore all precedent and hold coercive and threatening conduct unobjectionable). The Board obviously chose the latter course.

The issue now before this Court, then, is *not* whether K-Mart was entitled to a hearing on its objections but, rather, whether the Union conduct complained of, assuming now that it occurred just as K-Mart witnesses have alleged can, in law, conceivably be condoned or sanctioned in an election campaign.

Each of K-Mart's objections will, therefore, be discussed herein to counter the Board's all but incredible conclusion that threatening, coercive and misleading conduct on the part of the Union was not sufficient to justify invalidation of the election.

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[7]This remarkable position is set forth in footnote 1 to the Board's Decision: "In determining upon the requests for review whether the Employers' objections raised substantial and material issues of fact, the Board in accordance with its usual practice viewed the evidence in a light most favorable to the Employer-objectors and did not rely on any 'credibility resolutions'. Thus, the Board assumed the accuracy of the allegations of objectionable conduct as reported by the Employers' witnesses, and concluded that this conduct, if it happened as alleged, would be insufficient to warrant setting aside the election. Accordingly, the Board decided that a hearing was not necessary and that the objections were properly overruled. We here reaffirm the aforesaid ruling." [Vol. I, p. 325].

1. **The Board Committed Error in Overruling Its Regional Director, Who Determined That the Union Made a Material Misrepresentation of Fact Concerning Wage Rates Which Affected the Results of the Election.**

On the evening prior to the election, April 6, 1965, the Union distributed to K-Mart employees handbills which purportedly compared wage rates of certain K-Mart job classifications with those at rival union discount stores [Vol. III, G.C. Ex. 21, Ex. G]. In pertinent part, these leaflets contained the following chart:

Job	Wages Paid	
	K-Mart	Union
Checker	$1.80	$2.35
Houseware	1.80	2.20
Stock Room	1.80	2.10
Payroll Clerk	1.80	2.30

K-Mart contended, and the Regional Director found, that the leaflet incorporated false and misleading information on a matter of crucial inportance to employees—wages—which materially affected the results of the election. Specifically, the Union totally failed to tell employees of K-Mart, indeed gave no intimation whatsoever, that the listed "Union" rates were the *highest* of four wage categories in each job classification and *did not apply to employees until they had at least one year's experience or service.*

The evidence also showed that a substantial number of K-Mart employees had less than one year of employment and were clearly misled by this false union propaganda. The matters misrepresented were, as the Regional Director found, within the special knowledge of the Union and of such a nature that employees would have no independent means for evaluating them. Moreover, K-Mart had insufficient time to reply in view of the brief period remaining between the distribution of

the leaflets and the time of the election [Vol. III, G.C. Ex. 28[a] pp. 7-8].

On September 9, 1965, the Board, after granting review of the Regional Director's determination, reversed him and overruled the objection *even though conceding that the circular was in fact misleading and false.* [Vol. III, G.C. Ex. 40]. In so doing, the Board placed express reliance on two factors—(1) that some 10 days or more prior to its dissemination of the false leaflet, the Union had distributed a truthful one on the same subject, and (2) that K-Mart employees could have verified the accuracy of statements contained therein by inquiring of employees at nearby unionized stores [Vol. III, G.C. Ex. 40, p. 3]. The Board concluded, therefore, that the leaflet did not constitute a basis for setting aside the election.

K-Mart respectfully submits that no such conclusion is permissible on this record. Indeed, the rationale for the Board's decision borders on the frivolous. Established precedent, sound policy and the best interests of the employees all require that the Regional Director's original ruling should have been sustained. We contend that this issue is squarely controlled by the Board's own decision in *Hollywood Ceramics,* 140 NLRB 221 (1962). In that case, as here, the subject matter of the handbills distributed was wage rates, a subject the Board stressed to be of utmost concern to employees; there, as here, the employer's rates were understated and the recital of union rates omitted significant considerations (*i.e.,* the union there failed to make it clear that the "union scale" included an incentive factor, and indicated that its figures covered only base rates); the misstatements were disseminated among employees on election eve as were the instant misstatements—too late for meaningful rebuttal or response. In setting aside the election, the Board declared:

> "We are satisfied that the Petitioner violated the standards we have set forth. The handbill in question concerned wage rates, a matter of utmost concern to the employees, and the timing of its distribution was such as to prevent any reply to the handbill. Therefore, any substantial misrepresentation *could well have significantly affected the election results*. We conclude further the leaflet did convey a substantially erroneous picture of the comparative wage situation." (Emphasis added). (*Id.* at p. 225).

There can be no doubt that the Union's statements in this case also could "well have significantly affected" the election results.

The Board's decision in *Hollywood Ceramics* finds its Circuit Court counterpart in *U.S. Rubber Co. v. NLRB,* .... F. 2d .... (5th Cir., 1967) which similarly involved a misleading comparison made between wages and conditions at a union versus a non-union plant. The Fifth Circuit invalidated the election because of this deception, quoting with approval language of *NLRB v. Houston Chronicle Publishing Co.,* 300 F. 2d 273 (5th Cir., 1962) which is equally applicable here: "Purportedly authoritative and truthful assertions concerning wages . . . of the character of those made in this case are not mere prattle; they are the stuff of life for Unions and members, the selfsame subjects concerning which men organize and elect their representatives to bargain." To the same effect, see *Celanese Corp. v. NLRB,* 279 F. 2d 204 (7th Cir. 1960); *Ore-Ida Foods, Inc.,* 160 NLRB 102 (1966).

The decision of the court in *Graphic Arts Finishing Co., Inc. v. NLRB* .... F. 2d .... (4th Cir. 1967) Daily Labor Report No. 151, BNA, August 4, 1967, is directly in point. Twenty-four hours prior to the election, the union distributed a circular which listed wage rates allegedly being paid under union contracts. In reality,

the rates were a composite of those paid under various contracts in a geographic area other than that in which the employer did business. Moreover, no particular company in that area actually paid the rates listed in the circular.

This deception was the basis for denial of the Board's order over the latter's contention that the circular had an "insubstantial" impact on the election, the court stating:

> "In the instant case there was no opportunity to reply to the misstatement and the election was close; a switch of only five votes would have resulted in a union defeat. *The misrepresentation concerned subjects even more vital than those in Bonnie Enterprises* [*341 F. 2d 712 4th Cir. 1965*] *because here they dealt, in part, with wages. A misrepresentation of $.33 an hour with respect to apprentices' wages represents $13.00 per week and more than $600.00 per year. It appears beyond question that such a figure is material and would significantly affect the free choice of the employees. See Bok, Regulating NLRA Election Tactics, 78 Har. L. Rev. 38, 90 (1964).*" (Emphasis supplied).

See also,

> *NLRB v. Houston Chronicle Publishing Co., supra; Cleveland Trencher Co.*, 130 NLRB 600 (1961)

There is no meaningful ground for distinction between these cases and the one presently under consideration. In none of the cited cases were the statements "untruthful", *per se*. But they were half-truths; like the statements here involved, they concealed important information unfavorable to the party distributing them, while purporting to be a complete disclosure of all the facts.

The Board, as we have previously recited, reasoned that the misrepresentation was vitiated because the Union had previously mailed (on March 26, 1965) a detailed list of its wage rates. The thrust of this reasoning seems to be that a previous truthful statement will justify subsequent falsehoods. This might be appropriately dubbed the "relation-forward" doctrine or the principle of "cure-back".

This same argument was bluntly rejected by the Board itself in *Bowman Biscuit Co.,* 123 NLRB 202 (1959). The employer in that case was a division of the National Biscuit Co., which had recently negotiated a contract with the petitioning labor organization. The contract covered seven of the company's plants, but did not include the particular plant involved. On November 4, 1958, three days before the election, and again on the day preceding the election, the Union circulated handbills tending to create the impression that the same contract would become effective at the instant plant upon election of the Union. On the basis of these handbills, the Board ordered the election set aside. The Union had pointed out that on November 5, two days before the election, it had mailed to all the employees documents which revealed that the national contract was not applicable to their plant. Nevertheless, the Board declared:

> "In our opinion the misrepresentation of the true facts not only added prestige to the Petitioner and placed it in an advantageous position but also lowered the standards of campaigning to a level which impaired the untrammeled expression of free choice by the employees in the unit. We find, therefore, that the aforesaid objection raises material and substantial issues concerning conduct affecting the results of the election." (*Id.* at pp. 204-5).

In *Bowman Biscuit,* the "corrective" information was distributed *the day before the misleading circular.* Yet the misrepresentations "lowered the standards of campaigning" to a level which impaired an "untrammeled expression of free choice by the employees." How much less does the Union's "detailed listing", mailed on March 26—some eleven days prior to the election—vitiate the subsequent distortions promulgated on election eve? The answer could hardly be more apparent.

It is never possible, of course, to determine what the employees *actually* believed, nor even what they *probably* believed. But the burden is not on the employer to show that the employees were necessarily misled, rather, only to show that it is sufficiently likely that it cannot be told whether they were or were not. *NLRB v. Trancoa Chemical Corp.,* 303 F. 2d 456, 461 (1st Cir. 1962). Put another way, the test, as delineated in *Bowman Biscuit Co.* is whether the misstatements might "reasonably" have created a false impression. The same standard has been recognized and applied by the Board in the *Walgreen* and *Hollywood Ceramics* cases, *supra,* in *Calidyne, Kawneer,* and *Cleveland Trencher, supra,* and in *Grede Foundries,* 153 NLRB 984 (1965).

In the *Grede* case, the Union had circulated a handbill which stated the *maximum* weekly take-home pay as the *average* under union contracts, and which quoted only the highest hourly rates for skilled employees, the average hourly rates being considerably lower. The Regional Director found the handbill "inaccurate" but considered its effect minimal "when viewed in the context of the entire election campaign." The Board disagreed:

> "[W]e believe that the employees involved could reasonably construe the handbill to set forth the average or representative hourly rates or weekly earnings received under the Petitioner's contracts

> with the named companies rather than the wages of a few top-rate employees. We find, therefore, that the handbill was inaccurate and misleading as to the wages the Petitioner has negotiated—a matter of vital concern to the employees." (Emphasis added). (*Id.* at p. 986).

In light of this test, *i.e.,* whether the employees "could reasonably construe" the Union's handbill as setting forth "the average representative" wages under a union contract, the argument here that an earlier listing can eradicate the subsequent deception is patently without merit. The question, again, is what reasonable employees *might well* have believed. Plainly enough, they could reasonably have construed the Union's handbill of April 6 to indicate the uniform wage under an existing union contract. Indeed, if a doctrine of "cure" or "correction" is to be applied, the employees might reasonably have believed that the first "detailed listing" was inaccurate; that any contradiction between the two communications should be resolved in favor of the more recent one, *i.e.,* the false leaflet circulated the day before the election.

Note, too, that the Union, in its Request for Review to the Board, stated its prior "detailed listing" was mailed, not to every eligible voter, but to "*virtually* every eligible voter." [Vol. III, G.C. Ex. 29, p. 4]. K-Mart wishes to re-emphasize the fact that the election below was decided by one vote only. If a single employee believed the circular distributed on April 6, the result might well have been altered by false impression so created. The Board has consistently held that *each and every* employee is entitled to exercise his free and untrammeled choice in a representation election. See *U.S. Rubber Co.,* 86 NLRB 3, 5 (1949) ("[A]n election fails of its purpose unless it affords to all employees an opportunity to register their free and uncoerced choice

of bargaining representative."); *National Gypsum Co.*, 133 NLRB 1492, 1499 (1961). This policy could only have been given effect in the present case by upholding the Regional Director's Decision and direction of a new election.[8]

Neither were such misrepresentations justified, cured or abrogated by the Board's finding that K-Mart employees could have conducted their own research on the matter. We can only suggest that the Board must have made this statement with "tongue in cheek". The leaflets in question were circulated the day before the election. Surely the Board does not mean to suggest that employees have the burden of going to other employees of other stores (when there is no evidence in the record that such employees were known to K-Mart

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[8]If anything, the Regional Director did not go far enough in stating grounds upon which Objection 3 should have been sustained. He should properly have found that the handbill's false representation that the maximum K-Mart rate was only $1.80 an hour, provided further ground for sustaining this objection, for the evidence established that numerous K-Mart employees received in excess of $1.80. The Regional Director disregarded this falsehood because he believed the store rates were not within the Union's special knowledge and that K-Mart employees possessed independent knowledge with which to evaluate the representation [Vol. III, G.C. Ex. 28(a), p. 7].

First of all, if these rates were not within the Union's knowledge it had no business listing such rates at all. Misrepresentations may be made negligently (with reckless disregard of the facts) as well as deliberately. Moreover, it can hardly be said that the Union was unfamiliar with K-Mart wages. According to its own statements it had discussed wage rates with K-Mart employees in every conceivable manner over a six-month period [Vol. III, G.C. Ex. 29].

As for the employee's alleged ability to "evaluate" such statements, we need only note the Board's prior decision in *Walgreen Co.*, 140 NLRB 1141 (1963) which set aside an election for misrepresentations concerning benefits received by *fellow employees in the same store,* to discern that this conclusion was but makeweight. See also *Cleveland Trencher,* 130 NLRB 600 (1961) and *NLRB v. Bonnie Enterprises*, 341 F. 2d 712 (4th Cir. 1965) regarding misrepresentating benefits of plants in the same area.

personnel or that such discount stores were located nearby) and that they must perform this "duty" within the few hours available to them before the election. This second ground for overruling the Regional Director can only be characterized as absurd.

In view of the uncontradicted facts surrounding K-Mart's Objection No. 3 and the unequivocal law pertaining thereto, to hold K-Mart guilty of an unfair labor practice for refusing to bargain would be contrary to the Act and would foist the Union on K-Mart employees when they have not had an opportunity to exercise a free, informed choice.

2. Prior to the Election, Union Officials Coerced, Threatened and Intimidated K-Mart Employees; These Violations of the Act Require That the Election Be Set Aside.

The Union was not content, during its pre-election campaign with the circulation of misleading information to employees. It went much further. During the months of March and April, 1965, its agents threatened, coerced and intimidated various employees of K-Mart by stating that if they did not join or support, or if they opposed the Union, those employees would lose their jobs. These threats created an atmosphere of fear among those and other K-Mart employees, in violation of their rights as guaranteed in the Act and obviously interfered with the fair conduct of the election as well [Vol. G.C. Ex. 16, Objection No. 1].

In support of its objection, K-Mart supplied the Regional Director with the sworn affidavits of Elaine Williams and Linda Crabtree, two Commerce store employees [Vol. III, G.C. Ex. 21, Exs. "A" and "B", respectively]. The affidavit of Williams, standing alone, provides more than sufficient evidence of the coercive activity engaged in by Union representatives. According to Williams a Union agent,

known only to her as "Leroy" stated to her that, "If you don't join and the union is voted in, you will lose your job." [Vol. III, G.C. Ex. 21, Ex. "A", p. 2].

The Regional Director never reached the question whether this threat, if it occurred, would be sufficient grounds to require that the election be set aside. Rather, he appeared to have overruled this objection on the ground that Williams was not to be believed. This is to some extent surmise, since the claim was rejected with a summary comment, "The undersigned finds insufficient evidence to substantiate the allegation". However, the only reasonable explanation for his rejection is that credit was given to the Union representative who, according to the Regional Director, denied voicing any such threat at all [Vol. III, G.C. Ex. 28(a), p. 6].

Contrary to its Regional Director, the Board some twenty months later, as we have previously noted, began from the premise that K-Mart's witnesses *truthfully* testified as to the conduct of Union agents. For purposes of this argument, therefore, Williams' testimony must be credited. Consequently, the Board is on record to the effect that a direct threat by a known Union representative to an employee that she must join the Union or lose her job is not objectionable conduct! A more ludicrous position and one more destructive of employee rights can hardly be imagined.

This type of "campaign" activity has heretofore been steadily condemned by the Board in a remarkably consistent series of cases handed down since *G. H. Hess, Inc.*, 82 NLRB 463 (1949). There, a Union representative warned an employee, Basnett, that unless she voted for the Union, "the girls will refuse to work with you." On the basis of this remark, the Board found improper interference and ordered the election set aside:

> "The test, as this Board has recently had occasion to note, is whether the statement was reasonably calcu-

lated to have a coercive effect on the listener. In the context in which the statement by Lewis was made, it was reasonably calculated to convey to Basnett the threat that the employee members of the Union would make it intolerable for Basnett to continue in her job. We are of the opinion that this statement was reasonably calculated to restrain and coerce Basnett in the exercise of a free choice of bargaining representative and, as such, exceeded the permissible bounds of Union preelection activities."

More recent cases applying the same fundamental standards, *viz.*, the "free and uncoerced choice of a bargaining representative" are *Caroline Poultry Farms, Inc.*, 104 NLRB 255 (1953) and *Superior Wood Products, Inc.*, 145 NLRB 782 (1964). In *Caroline, supra,* the rival Teamsters and Meat Cutters unions each threatened that if the other was elected, distribution of the employer's product would be disrupted by member locals in New York City and at other distribution points. Such conduct, held the Board, amounted to a threatened loss of employment and was thus undue election interference. The same result obtained in *Superior Wood Products, supra,* where a union official warned that unless the union was elected, employees of the employer's biggest customer (where the same union was bargaining agent) would refuse to handle the employer's goods.

Note that in each case, the threats took the form of rather subtle suggestion. The employee in *G. H. Hess* was not told: "You will lose your job", although the implication was that her associates' uncooperative attitude would produce the result. Similar interpretation was required in *Caroline* and *Superior Wood Products.* The Union agents in the instant case, however, did not engage in delicate indirection. Elaine Williams (as well as Linda Crabtree) was bluntly told that she would

be out of work in the event of a Union victory. If mere intimation, or sly insinuation and allusion, sufficiently impairs "a free and uncoerced choice", how much more is that freedom impaired by undisguised threats of lost employment by Union functionaries plainly confident of success at the polls? The very nature of the circumstances contradicts the notion that any free choice whatever could have been exercised.

Even beyond this, like threats are frequently held *unfair labor practices* in violation of Section 8(b)(1)(A) of the Act. *United Mine Workers of America, etc.,* 143 NLRB 795 (1963) (employee who belonged to rival union was warned that he should quit job); *Montgomery Ward & Co., Inc.,* 142 NLRB 650 (1963) (employee told he must join union to keep job); *NLRB v. International Hod Carriers Union, Local 141,* 295 F. 2d 657 (7th Cir. 1961); *NLRB v. James Thompson & Co.,* 208 F. 2d 743 (2nd Cir. 1953); *NLRB v. International Longshoremen's and Warehousemen's Union,* 210 F. 2d 581 (9th Cir. 1954).

These cases have relevance in light of the Board ruling in *Dal-Tex Optical Co., Inc.,* 137 NLRB 1782 (1962) that an unfair labor practice is *a fortiori* to be treated as election interference:

> "Conduct violative of Section 8(a)(1) is, *a fortiori,* conduct which interferes with the exercise of a free and untrammeled choice in an election. This is so because the test of conduct which may interfere with the 'laboratory conditions' for an election is considerably more restrictive than the test of conduct which amounts to interference, restraint, or coercion which violates Section 8(a)-(1)." (*Id.* at pp. 1786-1787).

A final point should be observed here. In *G. H. Hess Co., supra,* the election was decided by a vote of 25-11. No mention is made in the opinion of challenges sufficient to affect the outcome nor, indeed, of any chal-

lenges at all. The case, moreover, was treated on the assumption that only one employee had been subjected to the objectionable threats; in other words, it was immaterial that the intimidation of a single employee could in no way have changed the election result. Further elaboration of this aspect of *Hess* is found in *U.S. Rubber Co.,* 86 NLRB 315 (1949), where the Board stated:

> "In a recent case [*Hess*] the Board held that an election fails of its purpose unless it affords to *all* employees an opportunity to register their free and uncoerced choice of bargaining representative. In that case, the Board set aside an election on the basis of interference with a single employee. Accordingly, the number of instances of interference, or the number of employees directly involved, are not material to the issue. When, as here, two employees have been interfered with in their choice of a representative, the requirements of a wholly free and uncoerced election have not been fulfilled." (Emphasis by the Board).

See also, *National Gypsum Co.,* 133 NLRB 1492 (1961), citing both *Hess* and *U. S. Rubber Co.* and affirming the principle just stated, as announced in those cases. And see *Vickers, Inc.,* 152 NLRB 793 (1965). The Act, of course, protects *all* employees, as these cases emphasize, and this is particularly true in the posture of an election campaign.

Although the single incident involving Williams provides an ample basis for invalidating the election, a word is in order concerning Crabtree. She testified by affidavit that an unidentified caller told her, ". . . if the union gets in, and you don't vote for us, you'll be looking for another job." [Vol. III G.C. Ex. 21, Exhibit "B"]. The reasons for ignoring Crabtree's statement are nowhere articulated either by the Regional

Director or the Board. We can only assume that this incident was dismissed solely becuase it could not be shown that the caller was authorized to speak for the Union.

Yet either as a matter of logic or law, the issue of agency or authority to speak for the Union is wholly immaterial on objections to an election. In this respect objections must be differentiated from unfair labor practice charges. The latter involve the issuance of corrective orders against employers or unions as entities. Issues of agency are directly related to the central task of the Board in such situations, which is to fix responsibility.

On the other hand, the purpose of a re-run election, the remedy sought by objections, is simply to insure employee free choice. If a threat was in fact made in the name of the Union (and Crabtree's statement was assumed by the Board to be true) the employee is no less coerced simply because she cannot verify with certainty the source of the threat. Indeed, under the rule presumably followed by the Board, either side may indulge in telephoned threats during an election campaign with complete impunity, confident that the victim's inability to make an identification will defeat any objections such threats might raise.

Similar Board reasoning was found wholly unacceptable by the Circuit Court in *NLRB v. Staub Cleaners, Inc.,* 357 F. 2d 1 (2d Cir. 1966). There an employer moved to have an election set aside on the ground that a *rumor* had been circulated that if the union lost the election, Negro employees would be discharged and replaced with whites. The Regional Director found that the rumor originated with a rank-and-file employee, not with the union. Nothing in the record was to the contrary. The Regional Director held that since union responsibility had not been shown, the employer's ob-

jections did not raise substantial or material factual issues with respect to the conduct of the election.

The Second Circuit disagreed, stating that:

> "In so holding, the Regional Director has completely ignored *the doctrine developed by the Board that '[elements, regardless of their source,* which in the experienced judgment of the Board make impossible impartial tests, are *sufficient grounds for the invalidation of an election.' P. D. Gwaltney, Jr. & Co.,* 74 NLRB 371, 373 (1947)." (Emphasis added).

This holding has very recently been reaffirmed by the 5th Circuit in *Home Town Foods, Inc., v. NLRB,* ..... F. 2d ..... (5th Cir. 1967) Daily Labor Report No. 128, BNA, July 3, 1967. The Regional Director had there dismissed six employer objections concerning specific acts of the Union or of Union supporters which allegedly impaired the election. The Board's Regional Director made no findings on the truth of these allegations but concluded that even if they were true the Union could not be held responsible as the conduct was that of rank-and-file employees. The Circuit Court took a contrary view,

> "We are not impressed with the argument that all coercive acts must be shown to be attributable to the union itself, rather the rank and file of its supporters. As the Board has once said, 'The important fact is that such conditions existed and that a free election is hereby rendered impossible.' *Diamond State Poultry Co.,* 1953, 107 NLRB 3, 6."

Here, also, the Board has misconceived the true rule with respect to election campaigns. The fact of the threat to Crabtree (which the Board accepts as true) is sufficient; the source of that threat is immaterial.

In light of the foregoing evidence and authority, all of which has been cited to the Board repeatedly at each

stage of this proceeding below, the Board's summary treatment of objection No. 1 is all but incomprehensible. Initially the Board denied K-Mart's request for a hearing on the matter, thus forcing this reviewing Court to speculate as to what the facts are and what the Board's decision would have been had a hearing been granted. And under its present position, the Board has concluded that the objection raises no substantial issues even if the threats occurred as alleged.

We submit that quite to the contrary, the Board's ruling can be justified only by *ignoring* all of the evidence and all of the authority pertaining to the point. Certainly once the Board *concedes* the accuracy of K-Mart's allegations, as it undoubtedly has, the election cannot be allowed to stand.

3. Union Representatives Engendered Fear in a K-Mart Employee in the Presence of Another Employee by Threats of Physical and Other Reprisals Which Conduct Unquestionably Prevented a Fair Election.

Consistent with the pattern of illegal tactics which is found throughout the pre-election campaign, Union agents, during the months of March and April, 1965, threatened K-Mart employees with physical harm, engendered fear in them by constant surveillance of their activities and thereby prejudicially affected the election [Vol. III, G.C. Ex. 16, Objection No. 2].

In support of its charge with respect to this conduct, K-Mart supplied the Regional Director and the Board with the affidavits of Commerce store workers Gordon Bloomfield [Vol. III, G.C. Ex. 21, Exhibit "C"], V. L. Cooper [Vol. III, G.C. Ex. 21, Exhibit "D"], Michael Castanon [Vol. III, G.C. Ex. 21, Exhibit "E"], and Irene Reyes [Vol. III, G.C. Ex. 21, Exhibit "F"]. Taken together, these affidavits charge that a K-Mart stock boy, Leo Hosey, was told by a Union representative, "You we don't want. You'd better hope that the

Union doesn't get in" or, according to statements made to Messrs. Bloomfield and Cooper by Hosey himself, the Union representative stated, "We know you Leo, and when we get in we'll get you."

As the Regional Director's report states, Hosey himself subsequently denied having been thus threatened by Union representatives and stated in his affidavit to the Board that he told the store manager and others merely that ". . . I was scared of the Union." He added, "I had no reason for this. I just felt that way . . ." Considering Hosey's denial, as well as the denial of the Union representative, the Regional Director concluded that the objection was without merit and overruled it [Vol. III, G.C. Ex. 28[a], p. 6].

The overruling of this objection *ex parte* by the Regional Director, based upon Hosey's "repudiation" and the Union's denial was improper and erroneous in the first instance. To begin with, the Regional Director ignored the fact, as expressed in the affidavits of Bloomfield, Cooper and Reyes, that Hosey during this time and thereafter was in a highly emotional and agitated state of mind and admittedly afraid of the Union. So afraid, we submit, that his repudiation necessitated his asserting that the testimony of Bloomfield, Cooper and others was false. But the statements of these witnesses cannot be categorized as perjury merely because a frightened Hosey repudiated them. They remain probative evidence, particularly under the circumstances.

Certainly, at the very minimum the testimony of coemployee Castanon, a *direct* witness to the threats made by the Union representative, could not be dismissed merely because Hosey later differed. The Act is a public Act. It protects *all* employees, including those who have been coerced into silence or repudiation. It also protects employees, such as Castanon, who may have

been coerced by such open and notorious conduct, even though not directly threatened themselves. Castanon's statement is clear proof of the violation. There is not a scintilla of evidence why such an employee, Castanon, should not be telling the truth. Indeed, under the Board's decision Castanon, it must now be assumed, told the truth concerning this incident.[9]

Thus, there no longer remains a conflict in the evidence on this point between an admittedly frightened employee, on the one hand, and strong impeaching as well as direct creditable contrary evidence, on the other, which would have required a hearing. The Board has conceded that all of K-Mart's witnesses alleged truthfully in their affidavits. *Therefore Hosey was in fact threatened!* Despite the Board's bald assertion to the contrary, once it is assumed that the Union's representative made the statement alleged in the affidavits supplied to the Board by K-Mart, there can be no argument but that such threats clearly constitute more than sufficient grounds for sustaining the objection and setting aside the election. In fact they amount to unfair labor practices.

This view is supported by numerous Board decisions and may be illustrated by language taken from *Checker Taxi Co., Inc.,* 131 NLRB 611, 619-621 (1961).

> "Respondent's agents made other direct threats of violence and recriminatory action to obstruct the organizational activities of DUOC and employee participation in such activities and support for that union. . . .

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[9]In his original decision the Regional Director alluded to Castanon's statement but gave it no credit or even discussion [Vol. III, G.C. Ex. 28(a), p. 6]. The Board denied review in the representation case, *completely* ignoring Castanon's testimony [Vol. III, G.C. Ex. 35]. On appeal from the instant unfair labor practice charge the Board accepted his allegations as true but, enigmatically, gave them no weight whatsoever [Vol. I, p. 325, n. 1].

* * * *

"Somewhat similar to the foregoing generalized threats are a number of veiled threats which, for the most part, the Trial Examiner rejected as being too vague to support finding a violation. However, the ready and overwhelming implication of the statements is, we find, the use of forcible means including resort to bodily harm to convince an employee he should forget about DUOC and working on its behalf. . . .

* * * *

"In sum, then, we find that Respondent Union by the acts set forth above involving the use of force and threats restrained and coerced employees of Respondent Companies in the exercise of the rights guaranteed by Section 7 and, thereby, violated *with respect to each such incident* Section 8(b)(1)(A) of the Act." (pp. 619-622) (Emphasis supplied).

The implied resort to bodily harm was there found in the remark, "Your ulcers will be bothering you" and in the query, "are you married?" How much more does the statement "We'll get you" carry the same "ready and overwhelming implication?" Witness the holding in *Ladies Garment Workers Union,* 146 NLRB 559, 561 (1964):

"The Trial Examiner found, and we agree, that the remark by McMikel [union organizer] 'Let him go *this time.* He is pushing his luck' was a threat and in and of itself a violation of Section 8(b)(1)(A): Its intent was that if Irwin continued to cross the picket line to go to work for the nonunion Susan Evans, he could expect to be assaulted again in the future." (Emphasis in original).

A threat, then, is *in and itself* an 8(b)(1)(A) violation, without regard to the circumstances or background

against which it is made. This point was fully spelled out in *United Sugar Worker's Union, ILA (American Sugar Co.)*, 146 NLRB 154 (1964):

> "We [the Board] agree with the Trial Examiner that the Respondent's president Randazzo, threatened employees with physical violence because of their opposition to Respondent, in finding that such threats were made, we rely only on the words used, and not on the Trial Examiner's conclusion that the 'quiet fashion' in which the statements were made 'was calculated to make them more ominous in their implications."

K-Mart invites attention again to *Dal-Tex Optical Co., Inc.*, 137 NLRB 1782 (1962), which held that conduct amounting to an unfair labor practice is so disruptive of "laboratory conditions" as to automatically constitute election interference; that while the converse is not necessarily true, a Section 8 violation is *a fortiori* grounds for invalidating an election. This principle was applied in *Stern Bros.*, 87 NLRB 16 (1949), to set aside an election for physical violence and threats thereof. See especially *Bloomingdale Bros., Inc.*, 87 NLRB 1326 (1949), where the election was set aside for interference including a statement that "after we win we will take care of you." It is virtually the same statement, *viz.*, "When we get in, we'll get you," on which Employer's Objection 2 is based.

While the threats themselves would have been sufficient justification for invalidating the present election, the Union did not stop with threats. Leo Hosey was placed under open surveillance and followed to and from his place of work [Attached Exhibit "C" and "F"]. This type of activity too, has been harshly criticized by the Board. In the *Checker Taxi* case, *supra*, union officers were followed in cars by rival union agents, and observers were stationed outside their apartments. Such surveillance, according to the Board, restrained the ex-

ercise of rights guaranteed by Section 7, and violated Section 8(b)(1).

Finally, in both objections 1 and 2, the threats of lost employment, and the Union warnings to Hosey, including threatened physical reprisals and maintaining continued surveillance over his activities, created such an atmosphere of fear and confusion among the K-Mart employees as to have a prejudicial effect upon the election. Note that the fact of the threats to Hosey was shortly thereafter communicated to a number of other employess. Hosey himself was in a highly emotional and agitated state at the time. The situation in its totality, taking into account the threatened loss of employment to Elaine Williams, Linda Crabtree and an indeterminate number of others, coul dhave no effect other than one in serious derogation of "laboratory conditions." A very like situation was presented in *Poinsett Lumber and Mfg. Co.,* 116 NLRB 1732 (1956). The specific incidents in that case were (1) a Union organizer told an employee that "she would be sorry" if she did not sign a Union card and that she would lose her job if the Union came in; (2) a Union organizer told another employee that the Union would make it so hard on him he could not work at the plant; and (3) two employees were threatened with physical violence. In setting aside the election, the Board ruled:

> "We are convinced that the threats of personal retaliation and of physical violence made to employees and the concomitant coercive effect thereof, constituted such serious conduct as to interfere with a free and untrammeled choice of representatives contemplated by the Act. Moreover, we find it unnecessary to determine whether or not such serious and coercive conduct can be attributed to the Union because the important fact is that an atmosphere of fear and reprisal existed and that a free election was thereby rendered impossible." (*Id.,* at p. 1739).

It is K-Mart's position that the same rule must prevail in the instant case. Here too, threats of "personal retaliation" and of "physical violence" were made. Employees were led to believe that their job were in jeopardy and the "concomitant coercive effect" is obvious. The only reasonable finding must be that a "free and untrammeled" choice of representatives was rendered impossible.

4. The Union Transmitted False and Misleading Information Via Telephone to a K-Mart Employee on Election Day. The Deception Pertained to Matters so Material as to Require That the Election Be Invalidated.

The Board and its Regional Director further erroneously overruled K-Mart's objection No. 6 which alleged that on the very morning of the election, April 7, 1965, but prior to the time the polls opened, the Union, through its officers, agents and representatives, made false and misleading statements on material matters to an employee of the K-Mart Commerce store [Vol. III, G.C. Ex. 16, Objection No. 6].

A brief review of the pertinent facts demonstrates, contrary to the conclusions reached in Board proceedings below, the major significance and falsity of statements made by a Union agent to 19-year old Carol Platteborze, an employee of the K-Mart Commerce store, which statements were proffered in support of Objection No. 6.

Exhibit "L" to Vol. III, G.C. Ex. 21, is an affidavit signed by Platteborze. As shown by this exhibit, she was telephoned on April 7, 1965—election day—at approximately 10:00 A.M. Her caller was a Union official, urging that she attend the election and cast her ballot. Platteborze "took this opportunity" to ask the representative numerous questions concerning Union membership and activities. Their conversation lasted for two hours. During that time, in response to her ques-

tions, the Union agent, together with another Union organizer, made the misrepresentations set out in Objection No. 6.

Several striking features of this telephone conversation should be noted at the outset. First, the subject employee manifestly considered the matters under discussion to be "material." In point of fact, she had become concerned about these items and so had put the questions into writing. Promptly after the discussion she reduced the answers to written form as well. (A copy of both questions and answers is attached to her affidavit.) The representations can hardly be classified "immaterial" under such circumstances. Regardless of their importance to other employees, they were obviously important to Platteborze. Under the rule stated in *G. H. Hess,* 82 NLRB 463 (1949) *U. S. Rubber Co.,* 86 NLRB 3 (1949), and *National Gypsum Co.,* 133 NLRB 1492 (1961), *all* employees are entitled to make a free and untrammeled choice at a representation election. If a single employee is duped or misled by Union agents, the election cannot stand.

Likewise, it is beyond dispute that the representations made to this employee were within the "special knowledge" of the Union. *Calidyne Co.,* 117 NLRB 1026 (1957); *Kawneer Co.,* 119 NLRB 1460 (1958), and *NLRB v. Trancoa Chemical Corp.,* 303 F. 2d 456 (1st Cir. 1962). Platteborze was thus entitled to rely upon the statements as proceeding from an "authoritative source."

Finally, no serious argument can be advanced that K-Mart—or anyone else—had an opportunity to rebut these statements. The conversation occupied the period from 10:00 A.M. to 12:00 noon, thus ending a scant 4½ hours before the election. The fact that the statements had been made only came to K-Mart's attention late that afternoon. Moreover, many of the state-

ments, such as those concerning Union dues, the Union's history of strikes and its practice of fining members for non-attendance, could not have been evaluated or disproved without Union cooperation. On this point, too, the misrepresentations are within the rule of *Calidyne Co., supra,* and progeny. The only remaining point for discussion is the demonstrable falsity of the statements.

Preliminarily, we must emphasize that again, with this objection, the Regional Director resolved conflicts of evidence *ex parte* without directing a hearing, despite his recognition that this objection, if believed, raised substantial issues. Thus, he stated:

> *"The answers, as the employee wrote them down, do contain misstatements concerning legal rights of employees and [the Union's] engagements in strikes in the past.* The union representatives denied making the misrepresentations attributed to them. *I credit their denial."* [Vol. III, G.C. Ex. 28(a), p. 9]. (Emphasis added).

Clearly then, the Regional Director overruled this objection *solely because he did not believe the allegations of K-Mart's witness, Platteborze.* But in his view, these allegations, if true, presented material misrepresentations of fact and law.[10]

The Board, here implicitly reversing its Regional Director, has adopted precisely the opposite approach.

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[10]The Regional Director concluded that Platteborze had faulty recollection, because she took no notes during the conversation and that it was only "afterwards" that she wrote down the questions and answers as she recalled them [Vol. III, G.C. Ex. 28-(a), p. 9]. In point of fact, however, the Regional Director failed to note that she wrote these questions and answers down within a matter of fifteen minutes after the telephone conversation [Exhibit "L" to Vol. III, G.C. Ex. 21].

As the Regional Director's Supplemental Decision reads, it implies that the store manager requested Platteborze to write

It has assumed that Platteborze told the truth and that the misrepresentations were made just as alleged, but has found that, even so, they provide no warrant for setting the election aside [Vol. I, p. 325, n. 1].

The following examples taken from the numerous misstatements made to Platteborze reveal that this position is absolutely insupportable:

(a) The Union agent advised Platteborze that the "double dues" assessment of Local #770 had been "decided a long time ago by the discount stores to help the food chain markets, so being that K-Mart is a new Union store . . . the decision will have no effect" on K-Mart employees. The Union's own newspaper belies this statement [Vol. III, G.C. Ex. 21, Exhibit "K"]. The article of March 1965, under by-line of Joseph DeSilva, states without qualification that *all* members of the local, in expressing "their contempt" for the "Employer's position", voted 5 to 1 in favor of double dues. In other words, the decision was *not* that of the "discount stores." Nor was the decision a "long time ago"; the article, appearing in March of 1965, observes that the vote was taken at a "jam-packed meeting earlier *this month*", *i.e.,* earlier in March 1965. Likewise, as pointed out *infra* in the discussion of Objection No. 4, there is not a scintilla of evidence to support a conclusion that the decision would "have no effect" on K-Mart employees—all the evidence points the other way.

(b) Numerous statements by the union official refer to the "contract" and to "provisions" thereof. Among

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out the Union representative's answers [Vol. III, G.C. Ex. 28-(a), p. 9] Platteborze's affidavit, however, clearly shows that the assistant manager stated that he would like to see such answers only in response to an inquiry by Platteborze as to whether indeed, he would want to see them [Vol. III, G.C. Ex. 21, Exhibit "L", p. 2].

the terms of this fictitious contract were the following: "Mostly everyone is to work 40 hours"; part-time employees receive "a dime more than the full-time"; part-time workers succeed to openings in a full-time shift on the basis of "seniority". These and other representations were all plainly calculated to emphasize the benefits of union representation. The overriding difficulty is that there was, of course, no collective bargaining agreement in force with K-Mart stores, nor could any terms of such a contract have been ascertained in advance of contract negotiations. These misleading statements were plainly violative of established and approved standards of appropriate campaign techniques. The comment in *Walgreen Co.*, 140 NLRB 1141 (1963), has application. In setting aside an election for union misrepresentations, the Board said:

> "We think that our dissenting colleague overlooks the timing of the handbill and the fact that it misstated the benefits of a *contract not yet reduced to writing.*" (Emphasis supplied).

The "benefits" or other terms alluded to may never be incorporated into a union contract with K-Mart. Employee reliance upon such statements, therefore, may eventually prove to have been wholly misplaced.[11]

(c) It was stated that "Local #770 hasn't had a strike in 25 years." Such an assertion would undoubtedly astonish those employers whose recent labor

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[11]In *NLRB v. Trancoa Chemical Corp.*, 303 F. 2d 456 (1st Cir. 1962), the Union had publicized a certain contract negotiated with another company, without stating that all of its terms rested on a contingency which had never occurred. In other words, there was no such contract. The court found this to be a "manifest misrepresentation", stating pointedly, "We are reminded of the lady who sought to persuade her butcher to meet the price quoted for lamb chops across the street. When asked why she didn't buy there she replied, 'They don't have any'." (*Id.* at p. 459).

difficulties have included intensive strike activity by the Union. In 1959, for example, Local #770 engaged in a month-long strike at the locations of *al* food employers where it was bargaining representative As a matter of fact, one of K-Mart's own licensees—Gallenkamp Shoes—has been subjected to Local #77(strikes within the stated time period.

(d) If an impasse *in negotiations* occurs, and a strike ensues, Platteborze was assured that "all the employees' jobs are given back to them, because it says in the contract that the job must go to those with the most seniority." This statement is false as a matter of law. Under long-standing principles of national labor policy, replacements may be retained on the job following a economic strike.

(e) "The employees are paid", in case of an economic strike, "unemployment for 36 weeks plus 13 weeks, if necessary, so they could be on strike for a year and get paid for it." See *Cal. Unemp. Ins.*, §1262 to the effect that unemployment compensation is not paid to economic strikers.

(f) Platteborze was advised that under an "open shop" agreement, nonunion employees would be paid at a lower rate than Union members. To those knowledgeable, this is patently untrue. See Section 8(a)(3) of the Act. Rank-and-file employees, however, do not ordinarily have such knowledge.

(g) The statement that "30 days after the Union's entry, a decertification Petition can be filed downtown" and the employees could vote the Union out, is seriously misleading. No decertification election, of course, can be held until one year after a previous valid election and then only upon petition of 30 percent of the employees in the unit. Sections 9(c)(3) and 9(e) of the Act.

Again, this reviewing Court will never know what position the Regional Director would have taken had he, in accordance with the law, directed a hearing on the above misrepresentations rather than making an unilateral resolution of credibility in favor of the Union agent who denied the statements *in toto*. But the Board presumably "did not rely on any 'credibility resolutions'." It concluded that such representations could not have materially affected the results of the election [Vol. I, p. 325, n.1].

This conclusion is clearly erroneous as a matter of law. Each of the above misstatements, considered separately, necessitate that the election be set aside. Considered in combination, they overwhelmingly dictate such a result.

This election was decided by a single vote, a circumstance under which Union misrepresentations become all the more aggravated. The cavalier treatment accorded this objection by the Board is wholly unwarranted. It provides ample ground for direction of a new election.

5. The Union Further Violated Fair Campaign Tactics by Inducing Votes in Offering a Waiver of Initiation Fees Contingent on the Union's Winning the Election.

On or about March 26, 1965, and at times thereafter, the Union distributed to employees at the store a letter and card which, taken together, wrongfully and deliberately offered those employees financial inducements for their vote in the coming election in that said card and letter offered to waive the Union initiation fee, *provided* the holder of the card voted for the Union in the election and/or provided the Union was selected [Vol. III, G.C. Ex. 16, Objection 5].

The letter and card, exhibits "I" and "J" to Vol. III, G.C. Ex. 21, contain an objectionable offer to

waive initiation fees in the event of a successful Union election. The card, or so-called "certificate" [Vol. III, G.C. Ex. 21, Exhibit "J"], was distributed among substantially all the employees in advance of the election and carried the legend: "The Bearer, whose name appears on the front of this certificate, shall not be required to pay initiation fees of any kind. . . ." [Vol. III, G.C. Ex. 21, Exhibit "I"], the accompanying letter, further specified:

> "This policy [of waiving initiation fees] shall apply to any K-Mart employee who becomes a member of our Union *as the result of our winning the election* at your store and who is employed there at the time the employees sign their first Union contract." (Emphasis added).

Taken together, the two documents illustrate that the holder of the certificate was to receive a free membership if the Union won the election. Until recently, a sharp distinction had been drawn in the Board decisions between a proposal of this character, considered unlawful, and a mere campaign offer of free memberships in no way conditioned upon the voting or the election results. The latter was considered unobjectionable as a traditional campaign practice not tending to reward or penalize employees on the basis of the vote.

Gruen Watch Co., 108 NLRB 610 (1954).

Quite a different situation, however, is presented here. The "waiver" is extended only to persons who become members "as a result of our winning the election at your store." The case thus falls directly within the exception delineated in *Gruen Watch* and applied by the Board to find interference in *Lobue Bros.,* 109 NLRB 1182 (1954). In *Lobue,* the Union had distributed the following card:

"United Fresh Fruit & Vegetable Workers
Local Industrial Union No. 78-CIO

This is to certify that .....
Name
..... employed
Address
by ..... at .....
Company City
is entitled to a membership book free of initiation fee after election and certification. . . .

....”
Date issued Representative

Objections to the election, based on this offer by the Union to waive fees, were upheld and certification denied:

> "We think there can be no question, on the specific wording of the cards distributed, that the employees who received these cards were to be given free memberships *only if the Petitioner won the election* and was thereafter certified as bargaining representative. We therefore conclude that the question presented here comes squarely within the language of our *Gruen* decision indicating that a pre-election offer of reduced initiation fees is objectionable when the promised benefit is 'contingent on how the employees voted in the election *or* on the results of the election.' Accordingly, we find that the distribution by the Petitioner of these cards as part of its pre-election campaign interfered with the conduct of the election." (Emphasis added). *Id.* at p. 1183.

K-Mart submits that the instant case is exactly the same as *Lobue*. Here, as in that case, the Union circulated certificates to the individual employees; while the wording of the cards is not identical, the accompanying letter specified with no uncertainty that the waiver would be granted only *if the Union wins*. The

letter, of course, in no way abrogates the significance of the cards, but rather provides a detailed explanation of their effect. So *if the Union was elected, the free membership would be granted upon presentation of the card.* This fact is pointed up by the notation that "the bearer" is not required to pay, and that the "certificate will be recognized as valid only if presented to the Union not later than thirty (30) days" after the effective date of an agreement. Note further that the front of the card states: "This certificate is valuable to you. Don't lose it." [Vol. III, G.C. Ex. 21, Exhibit "J"].

Thus, as in *Lobue,* there can be no question, on the specific working of the card distributed, that the employees who received these cards were to be given a free membership only if the Union won the election and was thereafter certified as bargaining representative.

The Regional Director held that *Lobue* did not apply because the offer in the instant proceeding was not conditioned upon how the employee would vote in the election [Vol. III, G.C. Ex. 28[a], p. 9]. But, in so holding, the Regional Director (1) completely sidestepped the fact that the waiver of the initiation fee was unquestionably conditioned on the "result of our [the Union] winning the election" [Vol. III, G.C. Ex. 21, Exhibit "I"] and (2) misread *Gilmore Industries,* 140 NLRB 100 (1962) as well as the other case he relied upon, the later Board case, *Gorbea, Perez & Morell S. en. C.,* 142 NLRB 475 (1963).

In *Gorbea,* the Board did not originally consider the Union's waiver of initiation fees in the circumstances of that case to constitute an exoneration of an 8(a)(5) violation on the part of the employer (133 NLRB 362 [1961]). The Court of Appeals for the First Circuit in effect disagreed with the Board and remanded the case for further findings. (*NLRB v. Gorbea, Perez & Morell S. en. C.,* 300 F. 2d 886 [1963]). On remand,

the Board held that the Union's waiver of initiation fees was not improper in that it was offered as a direct result of the employer's unfair labor practices which made a free election impossible. But, in so holding, the Board in the very same case that the Regional Director in the instant proceeding relies upon, went on to explain the difference between the *Lobue* and *Gilmore* cases. In the course of its opinion, the Board set forth its position (142 NLRB 475, 476 [1963]):

> "The Board has recently had occasion to reaffirm that the practice of offering special reduced initiation fees during an organizational campaign is not, of itself, interference with the conduct of elections. [*Gilmore Industries, Inc.,* 140 NLRB 100]. The Board has held, however, that a reduction or a complete waiver of initiation fees *does* interfere with the conduct of the election when the union's waiver is conditioned on how the employees vote *or on the results of the election.*" [*Lobue Bros.,* 109 NLRB 1182] (Emphasis added).

And the simple, unavoidable fact is that the Union in the instant case offered to waive initiation fees for K-Mart employees conditioned "on the results of the election.[12]

In April 1967, the Board discarded the *Lobue* rule, holding that a Union promise to waive initiation fees if it wins an election is not ground for setting the election aside. *DIT-MCO, Inc.,* 163 NLRB No. 147 (1967). Of course, at the time the Regional Director and Board ruled in the instant case, *Lobue* was valid

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[12]It should be noted that when the *Gorbea* case returned for the second time to the Court of Appeals for the First Circuit, that Court refused to enforce the order against the employer. 328 F. 2d 679 (1964). Similarly, the Court of Appeals for the Sixth Circuit refused to enforce the Board's position in the *Gilmore* case. See *NLRB v. Gilmore Industries, Inc.,* 341 F. 2d 240 (1965).

Board Law. K-Mart submits that the subsequent overruling of that case has no relevance here and should not work, *post facto,* to legitimatize acts which amounted to illegal inducements when they occurred. The Union quite obviously could not have relied on the Board's *subsequent* ruling.

More importantly, K-Mart urges that *DIT-MCO, Inc.,* which overturned *Lobue* as based on a faulty premise, is itself the product of unsound reasoning, and should not be followed by this Court.

In *DIT-MCO, Inc.,* the Board rationalized that where a waiver of initiation fee is conditioned on the outcome of an election no fee will be paid regardless of the result. If the Union wins there is, by postulate, no obligation, and if it loses, there is still no obligation because the Union is not the employees' representative. Therefore, said the Board, it is "illogical to characterize as improper inducement or coercion to vote 'Yes' a waiver of something that can be avoided simply by voting 'No'."

Boiled down, *DIT-MCO* reflects the Board's subjective opinion, unaided by any statistical or other supporting data, that a waiver of fees does not constitute an inducement to vote for the Union. Yet who is in a better position to know what ploys are effective in an election campaign, the Board or the Union? Unions are not eleemosynary institutions and would hardly engage in such waiver tactics unless they believed them to be a valuable organizational tool. If the Board is correct, and waivers are no inducement, Unions have foregone millions of dollars over the years to no good purpose.

Finally, the Board cases are legion that if an *employer* conditions any benefit (even a raise totalling less per year than the amount of initiation fee waived by the Union) on the outcome of an election, he is guilty of objectionable conduct. The Board here has taken another

step to insure that in the duel for employee's votes, the Union is armed with a machine gun, while the employer must counter with a pillow.

On all the facts and the law, taking together the certificate and letter in question, the Union made an outright offer of financial reward in the event of a victory, squarely within the prohibition of *Gruen Watch, Gorbea, Gilmore* and *Lobue, supra.* This Court should reject *DIT-MCO, Inc.,* find that the Union's action constituted improper election interference, and set aside the election on this ground as well.

6. The Union Circulated a Letter Containing False and Misleading Statements Concerning Payment of Union Dues Which, in and of Itself, Interfered With a Proper Election.

Approximately a week prior to the election the Union sent or distributed to K-Mart Commerce store employees a letter which falsely represented facts with regard to the payment of double union dues [Vol. III, G.C. Ex. 16, Objection No. 4].

Because of space requirements the facts and law concerning this objection will not be repeated here. The court is, however, respectfully referred to Vol. III, G.C. Ex. 32, pp. 11-14, for K-Mart's discussion of this objection in its Request for Review to the Board.

In summary, one cannot reconstruct the voyage of K-Mart's objections through the channels of administrative procedure below without being impressed by the undeniable fact that they were grossly mishandled by the Board at every turn. The initial error, committed by the Regional Director, was his failure to direct a hearing for the purpose of resolving the numerous conflicts in evidence uncovered by his investigation of these objections. This error, prejudicial enough standing alone, was compounded by the Board when,

almost incredibily, it concluded that K-Mart's charges, which cover a broad spectrum of alleged violations ranging from physical threats to deliberate misrepresentations, were insufficient to warrant setting aside the election even if they accurately described the Union's conduct.

While the Board has considerable discretion in these matters, it is proper to observe that with discretion goes responsibility. An integral part of that responsibility is to assure that parties raising substantial and material objections are accorded a fair hearing, and that such objections are not summarily discarded in language of the highest abstraction and generality. The Board has not properly performed its function. The election below was tainted by illegal Union conduct and subsequently whitewashed by the Board. As a result, the Union's certification cannot be allowed to stand.

V.
CONCLUSION.

For each and all of the above reasons, the Order which the Board seeks here to enforce is not supported by substantial evidence in the record and is contrary to all applicable case law. We most earnestly request that enforcement of the instant Order, accordingly, be denied.

Respectfully submitted,

CLARK, KLEIN, WINTER, PARSONS & PREWITT,
JOHN DONNELLY,
Attorneys for Petitioner, K-Mart, a Division of S. S. Kresge Co.

Of Counsel:
HILL, FARRER & BURRILL,
STANLEY E. TOBIN,

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY E. TOBIN

APPENDIX A.

Dissent in Thriftown, Inc. (161 NLRB No. 42).

"In the case now before us, the operating agreement not only specifically states that 'nothing in this agreement shall in any way be construed to constitute a co-partnership or joint venture between the parties hereto'; it also specifically provides that Astra, without the participation of Thriftown, will hire, fire, and discipline its own employees, determine their wages, rates of pay, and other benefits, and establish its own deductions for taxes, social security, and related items. These provisions are clearly at odds with a contractual intent on the part of Thriftown and Astra to create a joint-employer relationship. Nor are there in this record other facts from which such an intent may reasonably be inferred. We look in vain in our colleagues' opinion for evidence that Thriftown has actually controlled Astra's labor policies. Our colleagues rely only upon (1) vague provisions in the license agreement requiring Astra to conform to Thriftown's 'methods, rules, business principles, practices, policies and regulations,' and (2) the power granted to Thriftown to cancel the agreement upon only 60 days' notice without cause and upon 15 days' notice for good cause. We believe, however, that this evidence is insufficient to support a legal conclusion that Astra and Thriftown are joint employers. The conformity requirements are quite clearly aimed at fostering the public appearance of a single integrated enterprise. They have nothing to do with

the employment relationship as such. Nor do we think it controlling on the issue before us that the operating agreement grants Thriftown the ultimate right to dissolve the licensor-licensee relationship entirely. To our knowledge this is the first time that such a factor has been considered to be evidence of a joint-employer relationship. In fact, in the recent Bab-Rand Company case, one of the reasons upon which the Board relied in refusing to find a joint-employer relationship was that the lease agreement gave the licensor the right to terminate the lease within 24 hours if the licensee became involved in a labor difficulty that might lead to picketing of the store. We note, parenthetically, that the operating agreement also grants Astra the 'ultimate right' to terminate the lease agreement. Would the majority conclude from this that Astra is an employer of Thriftown's employees?

"The majority attempts to buttress its joint-employer finding by generalized references to Thriftown's 'extensive powers to control the operations of Astra', 'its retention of overall managerial control', and 'the extent to which it has retained the right to establish the manner and method of work performance.' We do not agree that the record in this case supports such broad conclusionary assertions. However, even if it did, these considerations appear to us to provide only a further indication of the parties' concern with creating the public impression of a unified enterprise. They are not enough to show that the parties *have established in*

fact a joint-employer relationship with respect to the licensee's employees. Substantially the same factors were present in S.A.G.E., Inc. of Houston. Although finding in that case that the licensor and licensee had created the impression of a single integrated enterprise, the Board nevertheless declined to find that the licensor and licensee were joint employers, and this because neither the license provisions nor the actual practice of the parties revealed that the licensor had the power to exercise, or actually did exercise, control over the labor policies of the licensee. We believe the same conclusion is compelled in this case for the same reason.

"The majority states that it does 'not intimate by (its) holding that licensor-licensee arrangements in a discount department store necessarily create a joint-employer relationship.' Yet the majority reverses the Regional Director's conclusion that Thriftown and Astra are not joint employers for the declared reason that the Regional Director 'failed to take into consideration the special nature of the relationship which exists between the parties in a discount department store.' From our reading of the majority opinion we take it that *our colleagues consider the creation of the outward appearance of a unified enterprise to be the mark of the 'special nature of the relationship' to which they allude. If that is so, we find it difficult to conceive of a situation where the majority would not almost as a matter of course find a joint-employer relationship present in any discount store operation involving a licensor-licensee arrangement.* In that respect we

think our colleagues go too far. We still believe in accordance with past precedent that there must be some legal foundation for a holding of a joint-employer relationship, supported either by language in the license agreement establishing that the licensor is empowered to influence the licensees' labor policy, or by a showing that the licensor has actually done so, from which the power to do so may be inferred. As there is no support for such a holding in this case, we dissent." (Emphasis supplied).

APPENDIX B.

COMPARATIVE CHART OF RETAIL JOINT-EMPLOYER CASES (1961-1967)

	"CONTROL" STANDARD											"APPEARANCE STANDARD		
	K-Mart License Agreement drafted at this time.													
T CRITERA EMPHASIZED BY NLRB[1]	Bargain City USA, Inc., 131 NLRB 803 (1961)	Frostco Super Save Stores Inc., 138 NLRB 125 (1962)	United Stores of America, 138 NLRB 383 (1962)	Spartan Dept. Stores, 140 NLRB 608 (1963)	S.A.G.E. Inc. of Houston, 146 NLRB 325 (1964)	Bab-Rand Co., 147 NLRB 247 (1964) [White Front Stores, Inc.]	Esgro Anaheim, Inc., 150 NLRB 401 (1964) [White Front Stores, Inc.]	New Fashion Cleaners, Inc., 152 NLRB 284 (1965) [White Front Stores, Inc.]	Triumph Sales, Inc., 154 NLRB No. 71 (1965) [White Front Stores, Inc.]	Grand Central Liquors, 155 NLRB No. 33 (1965)	Jewel Tea Co., 162 NLRB No. 44 (1967)	K-Mart (Commerce),[5] 21-RC-9309, et al. (1965)	K-Mart (San Fernando), 159 NLRB No. 28 (1966)	Thriftown, Inc. 161
; licensor control ing policies of censees?	yes	no	some	no	no	no	no	no	no	no	yes	no	no	n
licensor discharge lic- ees' employees?	yes	yes	yes	yes	no	no	no	yes	no	yes	yes	no	no	n
; licensor control hours mployment for licen- ;' employees (other h opening and closing rs for store)?	yes	no	no	yes	no	no	no	no	no	no	no	no	no	n
; licensor determine es of licensees' loyees?	yes	no	no	yes	no	no	no	no	no	no	no	no[6]	no[6]	n
e payroll for all loyees?	yes	no	no	no	no	no	no	no	no	no	no	no	no	n
licensor control ber of licensees' em- yees (other than ffieient number")?	yes	yes	no	?	no	no	no	no	no	no	no	no	no	n
form fringe benefits?	yes	no	no	yes	no	no	no	yes	no	no	yes	no	no	n
s licensor set labor ations policies for ensees?	yes	yes	yes	yes	no	some[3]	some[3]	some[3]	no	yes	?	no	no	n
ISION) JOINT EMPLOYER?	yes	yes	yes[2]	yes	no	no	no	no	no	yes[4]	yes	yes	yes	ye

f these cases involve retail employers relationship is fixed by contract. er the relationship is licensor-licensee ssor-lessee, the criteria generally sized by the NLRB is the same. Not all ria are emphasized in all cases. In eases certain criteria are not dis- d but the facts appearing in those ions supply the basis for answering criteria questions on this chart. In cases the answer is not supplied even e given facts and, where so appropriate, stion mark is used.. In all these cases, oard found the employees shared the same ities, that the licensor promulgated rm rules and regulations, that the lic- had customer-oriented supervisory con- over the operations of the store and the licensor and licensees held themselves o the public as a single store.

3 Licensees agreed to be bound by any collc bargaining agreement negotiated by licens

4 The Board discussed and properly distingu the Esgro line of cases.

5 The Regional Director's Decision in the representation case on the joint employer question appears at Vol. III, G.C. Ex. 5

6 The NLRB erroneously concluded that K-Mar controlled wage rates for its licensees' employees.

APPENDIX C.

Statutes and Code Sections.

Sec. 8(a): It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds

for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a);

Sec. 8(b): It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

Sec. 9(c)(3): No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

Sec. 9(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8-(a)(3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner

to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Board Regulations, Section 102.69:

(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges, or both. If a consent election has been held pursuant to section 102.62(b), the regional director shall prepare and cause to be served on the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D.C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D.C. with copies of such request served on the other parties, any party may file with the Board in Washington, D.C., eight copies of exceptions to such report, which shall be printed or otherwise legibly duplicated, except that carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve

a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.62 (b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation, or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenged, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decison, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith.

(d) Any hearing pursuant to this section shall be conducted in accordance with the provisions of sections 102.64, 102.65, and 102.66, insofar as applicable, ex-

cept that upon the close of such hearing, the hearing officer shall, if directed by the regional director, prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. In any case in which the regional director has directed that a report be prepared and served, any party may, within 10 days from the date of issuance of such report, file with the regional director the original and one copy, which may be a carbon copy, of exceptions to such report. A copy of such exceptions shall immediately be served on the other parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

Calif. Unemp. Ins. Code Sec. 1262; Strike; ineligibility. An individual is not eligible for unemployment compensation benefits, and no such benefits shall be payable to him, if he left his work because of a trade dispute. Such individual shall remain ineligible for the period during which he continues out of work by reason of the fact that the trade dispute is still in active progress in the establishment in which he was employed.

APPENDIX D.

(Pursuant to Rule 18(f) of the Rules of Court).

1. Representation Case Exhibits (21-RC-9128, et al.)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - 1(j)	6	7	7	
Employer's (K-Mart) Exhibits*				
1	70	70	71	
2	138	138	138 – 39	
3(a)	214	215	215	
3(b)	216	216	217	
3(c)	217	218	219	
3(d)	219	220	220	
3(e)	221	222	222	
3(f)	222	223	223	
3(g)	224			

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II-A.

2. Unfair Labor Practice Case Exhibits (Case No. 21-CA-6937)

GENERAL COUNSEL'S EXHIBITS*

No.	Identified	Offered	Received	Rejected
1(a) - (j)	7	7	7	
2(a) - 49	18	18	19	
K-Mart Exhibits*				
1(a) - (d)	43 – 44	44	48	
1(e) - (d)	49	49	50	
2, 3	50 – 52	52		52
4	55	55	55	
5	56	56		57 – 58
Mercury Exhibits*				
1-4	61 – 62	62	63	

*References are to the Reporter's stenographic transcript appearing at Transcript of Record, Volume II.

Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

RETAIL CLERKS UNION, LOCAL 770, affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Intervenor.

On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF INTERVENOR, RETAIL CLERKS UNION, LOCAL 770.

ARNOLD, SMITH & SCHWARTZ,
GEORGE L. ARNOLD,
6404 Wilshire Boulevard,
Suite 950,
Los Angeles, Calif. 90048,

Attorneys for Intervenor, Retail Clerks Union, Local 770.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

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No. 21,649

HOLLYWOOD HAT CO.,

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vs.

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RETAIL CLERKS UNION, LOCAL 770, affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Intervenor.

On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF INTERVENOR, RETAIL CLERKS UNION, LOCAL 770.

I.
INTRODUCTION.

Three separate briefs have been filed by the Petitioners in this matter. The main thrust of all the briefs of the Petitioners must be that there is not sufficient evidence in the record to support the finding of the Board that a joint employer relationship existed between K-Mart, a Division of S. S. Kresge Company (hereinafter referred to as "K-Mart") and its licensees at its stores in the City of Commerce, State of California. Intervenor's brief will deal with this major issue and with respect to all other issues raised by the Petitioners relies on the brief of the General Counsel.

II.
COUNTER-STATEMENT OF CASE.

As its statement of the case, Intervenor cites the following finding of the Board in its Decision and Direction of Elections in Case No. 21-RC-9309, which was the underlying representation case with reference to the Complaint and Decision which is the subject matter of the instant Petition [G.C. Ex. 5(a)]:

> "1. K-Mart, a Division of S. S. Kresge Company, herein referred to as K-Mart, owns and manages retail department stores in Westminster, Santa Ana, San Fernando, Commerce, Montclair and Costa Mesa, California. The three petitions involved herein cover Westminster, Santa Ana and Commerce. K-Mart stores consist of various departments, some of which are operated by licensees

pursuant to uniform lease agreements with K-Mart. The licensees include Gallenkamp Stores Co., which sell shoes, Mercury Distributing Company, which sells apparel, Acme Quality Paints, which sells household items, F & G Merchandising, which sells automobile accessories and services automobiles, Hollywood Hat Co., which sells hats, and Besco Enterprises, Inc., which sells jewelry and cameras. The licensed departments are integrated into the general operations of the stores and are unidentifiable. Under the license agreements, K-Mart retains control over advertising and merchandise, retains the right to audit the records of the licensees, retains control over the physical layout of the store and handles all complaints, exchanges and refunds through its service desk. All credit is approved by K-Mart. In addition, the licenses require the licensees to comply with rules and regulations which the licensor promulgates. These may cover such subjects as employment practices, personnel and store policies, and pricing of merchandise. The rules and regulations now in effect between K-Mart and each licensee allow K-Mart to take applications of persons desiring employment with the licensees and require the licensor and the licensee to check with each other before hiring a present employee or former employee of the other. Under these rules and regulations, the licensee agrees to operate its department during hours established by the licensor and not to continue a labor dispute which materially affects the sales or operations of other licensees or the licensor, and employees of the licensees are required to attend sales and training meetings."

III.
SUMMARY OF ARGUMENT.

The Board has the statutory authority to find that the Petitioners are joint employers for the purpose of Section 9 of the Act, and its finding of an appropriate unit is not arbitrary.

IV.
ARGUMENT.

There Was Clearly Sufficient Evidence to Support the Board's Dual Findings That K-Mart and Its Licensees Were Joint Employers Within the Meaning of Section 9 of the Act and That the Employees of the Joint Employers Constitute an Appropriate Unit.

The statutory authority of the Board to find a joint employer relationship for the purpose of a single bargaining unit of employees of multiple employers has long been recognized by the Courts. (*Boire v. Greyhound Corp.,* 376 U.S. 473 at 481, 55 LRRM 2694 (1964); *NLRB v. Checker Cab Co.,* 367 F. 2d 692 (C.A. 7, 1966), 63 LRRM 2243, cert. den. 385 U.S. 1008, 64 LRRM 2108 (1967); *NLRB v. Greyhound Corp.,* 368 F. 2d 788 (C.A. 5, 1966), 63 LRRM 2434; *NLRB v. Lund,* 103 F. 2d 815, 819 (C.A. 8, 1939), 4 LRRM 607).

In *Boire v. Greyhound, supra,* the Board had found that a multiple employer unit consisting of the employees of Greyhound and the employees of an outside janitorial contractor, Floors, Inc., who performed janitorial services at the Greyhound terminals, was appropriate. The lower federal courts had held that the Board had acted in excess of its authority under the Act upon the

grounds that the facts set forth in the Board decision were on their face insufficient to create a joint employer relationship but instead established that the janitorial contractor was an independent contractor. In reversing, the Supreme Court stated (*Boire v. Greyhound Corp., supra,* 376 U.S. at 475):

> "The Board found that while Floors hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that Floors' supervisors visited the terminals only irregularly—on occasion not appearing for as much as two days at a time—and that in at least one instance Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory. On this basis, the Board, with one member dissenting, concluded that Greyhound and Floors were joint employers, *because they exercised common control over the employees,* and that the unit consisting of all employees under the joint employer relationship was an appropriate unit in which to hold an election. The Board thereupon directed an election to determine whether the employees desired to be represented by the Union.
>
> * * *
>
> ". . . The respondent points out that Congress has specifically excluded an independent contractor from the definition of 'employee' in §2(3) of the Act. (Footnote citation) It is said that the Board's finding that Greyhound is an employer of

employees who are hired, paid, transferred and promoted by an independent contractor is, therefore, plainly in excess of the statutory powers delegated to it by Congress. This argument, we think, misconceives both the import of the substantive federal law and the painstakingly delineated procedural boundaries of *Kyne*. [*Leedom v. Kyne,* 358 U.S. 184, 43 LRRM 2222.]

"Whether Greyhound, as the Board held, possessed *sufficient control* over the work of the employees to qualify as a joint employer with Floors is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves occupy an independent contractor status. And whether Greyhound possessed *sufficient indicia of control* to be an 'employer' is essentially a factual issue, unlike the question in *Kyne,* which depended solely upon construction of the statute . . ." (Emphasis and parenthetical citation added.)

After many years of litigation, the Fifth Circuit recently upheld the finding by the Board that the bus company employees and the employees of the janitorial service company working at the company's terminals did constitute an appropriate joint employer bargaining unit. *NLRB v. Greyhound Corp., supra,* 368 F. 2d 778.

The *Greyhound* cases unequivocally hold that it is for the Board in the representation hearing to decide whether a joint employer relationship exists and whether the employees of the joint employers constitute an appropriate bargaining unit.

In the joint employer relationship before the Courts in the *Greyhound* cases and before this Court in the instant petitions, the joint employers may be designated as primary and secondary employers. In *Greyhound* the direct employer was the janitorial contractor who had the primary responsibility with respect to the basic working terms and conditions of hiring, paying, disciplining, transferring, promoting and discharging the janitorial employees, while Greyhound was a secondary employer with far less responsibilities and control over the joint employer-employee relationship. Similarly, in the instant case the lessees are the primary employers and K-Mart is the secondary employer in the joint employer-employee relationship.

The Petitioners in the present case appear to argue that K-Mart, the secondary employer, "must dominate" the employer-employee relationship between the licensees and their employees. This makes little sense in either logic or the law. The "indicia of control" sufficient to support a joint employer finding is that the multiple employers share or have common control over the employees and such common control can exist even though the secondary employer, such as K-Mart, does not dominate the multiple employer-employee relationship.

This is well illustrated by the Fifth Circuit's decision in *NLRB v. Checker Cab Co., supra,* 367 F. 2d 692. In that case clearly the dominant control over the employer-employee relationship was exercised by the individual members of Checker Cab Company. Checker Cab Company, however, was found to have had a degree of control sufficient to support a joint employer finding upon facts similar to those involved in the instant Petitions.

In the *Checker Cab Co.* case the individual members were the primary employers owning and operating their own cabs with final authority to hire and fire the drivers of its cabs. However, by the use of Checker Cab Company the member-employers had

> "banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations." (367 F. 2d at 698.)

In the instant case K-Mart and all of its licensees have banded themselves together as an integrated operation in which to the public they are unidentifiable. They share control of virtually all of the aspects of the employer-employee relationship. Certainly the sharing of control set forth in the Decision and Direction of Election by the Board is more than sufficient under both the *Greyhound* cases and the *Checker Cab Co.* case to support a finding of a joint employer relationship.

The *Greyhound* and *Checker Cab Co.* cases also demonstrate the wide discretion granted to the Board in unit determinations involving joint employers and the limited function of the Courts. In the *Checker Cab Co.* case, *supra,* the Court quoted from the decision of the Eighth Circuit in *NLRB v. Lund,* 103 F. 2d 815, 819, 4 LRRM 697 (C.A. 8, 1939) as follows:

> " '. . . The inference to be drawn from these decisions of the Supreme Court and from the language of the statute is that, within the meaning of the Act, whoever as or in the capacity of an employer controls the employer-employee relations

in an integrated industry is the employer. So interpreted it can make no difference in determining what constitutes an appropriate unit for collective bargaining whether there are two employers of one group of employees or one employer of two groups of employees. Either situation having been established the question of appropriateness depends upon other factors such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations. There may be others; but, unless the finding of the Board is clearly arbitrary upon the point, the court is bound by its finding. In the present instance the conclusion of the Board appears reasonable rather than arbitrary, and its finding is sustained.' "

Finally, with reference to the present Petitioner's contention that the Board's ruling in the K-Mart case forces employers to bargain together against their will, this issue was expressly raised in the *Checker Cab Co.* case, *supra.* The Court dealt with it as follows (367 F. 2d at 697):

"Early in its history the NLRB asserted its power to enter bargaining orders requiring independent employers to bargain jointly against their expressed wishes. In *Waterfront Employers Association of the Pacific Coast,* 71 NRLB 80, 111, 18 LRRM 1465 (1946), the Board said:

'We conclude, therefore, that this Board is empowered by the Act to find multiple-employer units appropriate for the purposes of collective bargaining, and that we may properly exercise that power under the circumstances in this case. We are not

persuaded otherwise by the fact that the companies and employer associations have indicated that they do not desire multiple-employer units. To hold in all cases, especially where the employers have themselves acted on a multiple-employer basis, that the Board is precluded in the face of employer opposition from finding a multiple-employer unit to be appropriate, is to permit the employers to shape the bargaining unit at will, notwithstanding the presence of compelling factors, including their own past conduct, decisively negating the position they have taken. Contrary to the mandate given the Board under the Act, such a holding would in effect vest in the hands of the employers rather than the Board the power to determine the appropriate unit for collective bargaining purposes.' "

V.

CONCLUSION.

It is respectfully submitted that the Board's Decision and Order of Election in the underlying representation case was reasonable, supported by the evidence, and not arbitrary. The Order of the Board in the unfair labor practice should, therefore, be enforced.

Dated: November 17, 1967.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ,
By GEORGE L. ARNOLD,
Attorneys for Intervenor, Retail Clerks Union, Local 770.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE L. ARNOLD

Nos. 21,621, 21,632 and 21,649

In the United States Court of Appeals for the Ninth Circuit

GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; AND F & G MERCHANDISING, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS UNION LOCAL 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR

K-MART, A DIVISION OF S. S. KRESGE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS UNION LOCAL 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR

HOLLYWOOD HAT CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

and

RETAIL CLERKS UNION LOCAL 770, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO, INTERVENOR

On Petitions to Review and Set Aside, and on Cross-Petitions to Enforce an Order of the National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
NANCY M. SHERMAN,
LEONARD M. WAGMAN,
Attorneys,
National Labor Relations Board.

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In the United States Court of Appeals for the Ninth Circuit

Nos. 21,621, 21,632, 21,649

GALLENKAMP STORES CO.; MERCURY DISTRIBUTING COMPANY; ACME QUALITY PAINTS; AND F & G MERCHANDISING, PETITIONERS

v.

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and

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court on petitions to review and set aside an order of the National Labor Relations Board, issued against petitioners (herein the Employers) on December 30, 1966, and on the Board's cross-petitions for enforcement pursuant to Section 10(e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*).[1] The Board's decision and order (R. 324-328, 305-313)[2] are reported at 162 NLRB No. 41. As the Board's order is based in part on findings made in a representation proceeding under Section 9 of the Act, the record in the representation proceeding (Board Case No. 21-RC-9309) is part of the record before the Court pursuant to Section 9 (d) of the Act. This Court has jurisdiction, the unfair labor practices having occurred in the City of

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[1] The pertinent statutory provisions are reprinted in the Appendix, *infra*, pp. 72-76.

[2] References to the pleadings, the decision and direction of election, the Regional Director's supplemental decision and direction, the Board's decision on review and certification of representative, the decision and order of the Board, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript of the representation proceedings reproduced pursuant to Court Rules 10 and 17 are designated "R. Tr." "Er. X." refers to exhibits in the representation proceeding. References to portions of the stenographic transcript of the unfair labor practice complaint proceedings are designated "C. Tr." "G.C.X." refers to exhibits of the General Counsel. Whenever in a series of references a semicolon appear, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

Commerce, California, within this judicial circuit. No jurisdictional issue is presented.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that the Employers violated Section 8(a)(5) and (1) of the Act by their admitted refusal to bargain with the Union [3] which had been certified by the Board, following the representation proceedings described below, as the exclusive bargaining representative of the Employers' employees in an appropriate unit.[4]

The representation proceedings here involved were processed under Board rules and regulations adopted pursuant to a 1959 amendment to Section 3(b) of the Act, which authorizes the Board to delegate to its regional directors certain of its statutory powers over such proceedings and permits the Board to review such action.[5] The Board's findings are summarized below.

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[3] Retail Clerks Union Local 770, Retail Clerks International Association, AFL-CIO, herein called "the Union." The Union has intervened in the instant proceedings.

[4] The unit is "all regular full-time and part-time employees employed at K-Mart's Commerce, California, store, including selling, nonselling, and office clerical employees, and employees of licensees; excluding guards, professional employees, and supervisors as defined in the Act" (R. 308; 21).

[5] The 1959 amendments added the following language to Section 3(b):

> "The Board is also authorized to delegate to its regional directors its powers under Section 9 to determine the

A. *The Representation Proceedings.*

1. *The Regional Director's unit determination in Board Case No. 21-RC-9309*

K-Mart, a Division of S. S. Kresge Company, owns and manages a retail department store at Commerce, California (R. 15; R. Tr. 34). Several of the selling departments at the Commerce store are operated by licensees pursuant to uniform lease agreements with K-Mart (R. 15; R. Tr. 37-38, 42, 70, Er. X. 1). In December 1964, pursuant to Section 9(c) of the Act, the Union filed a representation petition with the Board's Regional Director in Case No. 21-RC-9309,[6]

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unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of Section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph * * *." See, *N.L.R.B.* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 251, n. 26 (C.A. 5).

[6] The Regional Director consolidated Case No. 21-RC-9309 with three other representation cases (Board Cases Nos. 21-RC-9128, 21-RC-9130 and 21-RC-9308) each of which involved a separate store-wide unit of employees at one of three K-Mart stores at Westminster, Santa Ana, and San Fernando, California, respectively (R. 7-12). Following the hearing, the Regional Director severed Board Case No. 21-RC-9308, which concerned the San Fernando K-Mart store (R. 14). The Regional Director's decision and direction of elections in the remaining three cases pertained to K-Mart's stores at Commerce, Westminster and Santa Ana (R. 14-22). The proceeding before the Court pertains only to the Union's certification as bargaining representative at the Commerce store (R. 329-356).

seeking certification as the bargaining representative of a store-wide unit at K-Mart's Commerce store, including the employees of licensees Gallenkamp Stores, Mercury Distributing Company, Acme Quality Paints, F & G Merchandising, Hollywood Hat Co., and Besco Enterprises, Inc. (R. 14; 10).[7]

Following a hearing on the Union's petition, the Regional Director issued a decision and direction of elections in which he found, contrary to the contentions of K-Mart and its intervening licensees (Mercury Distributing Company, and Gallenkamp Stores), that each of the licensees and K-Mart were "joint employers of the employees in each of their respective departments" (R. 307; 15). The Regional Director also found, contrary to K-Mart, Mercury and Gallenkamp, that a store-wide unit including all employees at the Commerce store was appropriate, and directed an election (R. 16, 21-22). On March 5, 1965, K-Mart requested the Board to review the Regional Director's Decision and Direction of Elections on the grounds, *inter alia*, that the record did not establish that it was a joint employer with the licensees, and that employees of F & G Merchandising could not properly be included in the unit because they lacked sufficient community of interest with the other unit employees employed at K-Mart's Commerce store (R. 307; 23-73).[8] F & G Merchandising also re-

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[7] There was no disagreement among the parties to the representation proceeding that separate, single-store units would be appropriate (R. 16; R. Tr. 21).

[8] In its Request for Review, K-Mart also contested the exclusion of three assistant managers from the Commerce

quested the Board to review the Regional Director's Decision and Direction of Elections on these same grounds (R. 307; 75-87). Gallenkamp and Mercury sought Board review of the Regional Director's Decision and Direction of Elections on the ground that the record did not show that K-Mart and its licensees were joint employers (R. 307; 88-97). On March 30, 1965, the Board denied the requests for review on the ground that they raised "no substantial issues warranting review" (R. 307; 98).[9]

The Regional Director's finding that K-Mart and each of its licensees constituted joint employers of the licensees' departments was based upon the following facts developed at the hearing:

As noted above, at p. 4, K-Mart's Commerce store includes several departments operated by licensees under uniform lease agreements with K-Mart. The licensees include Gallenkamp, which sells shoes; Mercury, which sells clothing; Acme, which sells paint and other household items; F & G Merchandising, which

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unit, contending that they enjoyed a sufficient community of interest with unit employees to warrant inclusion (R. 54-59). However, in the instant unfair labor practice proceeding, that contention has been abandoned.

[9] Section 102.67(f), Series 8 of the Board's Rules, as amended (29 C.F.R. 102.67(f)) provides, in part, that "denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." Thus, the Board's denial of the requests for review of the Regional Director's decision and direction of election at K-Mart's Commerce store constituted an affirmance of the Regional Director's unit determination.

sells automobile accessories and services automobiles; Hollywood Hat, which sells hats; and Besco, selling jewelry and cameras (R. 15; R. Tr. 38-39). Each of the licensed departments operates as an integral part of the K-Mart Commerce store, and none is identifiable by customers as other than a department of that store (R. 15; R. Tr. 88-93, Er. X. 1, p. 4). Goods, including items sold by the licensees, are bagged or wrapped in unmarked paper at central checkout stands, where the employees say, "Thank you for shopping at K-Mart" (R. Tr. 99-100). Under the provisions of K-Mart's license agreements, the licensees must "conduct sales on the premises solely under the name of K-Mart," and may not engage in advertising activity or sell goods not specified in the license agreement without the consent of K-Mart (R. 15; Er. X. 1, p. 5). K-Mart also retains the right to audit the licensee's sales records and to change the location and size of the licensed area (R. 15; Er. X. 1, p. 26). K-Mart handles all customer complaints, exchanges and refunds through its service desk (R. 15; R. Tr. 93-95). All credit sales are subject to approval by K-Mart (R. 15; R. Tr. 79-80, 195-197, Er. X. 1, p. 6).

Paragraph 4 of the license agreement requires licensees to comply with all local, state and Federal laws governing their operations, and to furnish evidence of compliance with all statutes pertaining to workman's compensation, and employee health and welfare benefits (Er. X. 1, p. 3). Further, the license agreement contains a declaration by the parties that the success of their "enterprise is dependent

upon compliance with common standards hereinafter referred to as Rules and Regulations for the conduct of the business, as established from time to time by [K-Mart]" (R. 15; Er. X. 1, p. 1). Paragraph 10 of the agreement provides:

> The Licensor shall from time to time, for the benefit of the common enterprise, establish, amend, modify or revise uniform Rules and Regulations consistent with this License Agreement which shall govern but not be limited to the following subjects: order and appearance of the store . . . employment practices, personnel and store policies . . . . The Licensor agrees to furnish Licensee with written copies of such Rules and Regulations (R. 15; Er. X. 1, p. 4).

The Rules and Regulations thus promulgated by K-Mart provide that K-Mart's manager, therein made "responsible for the over-all operation" of the store,[10] may request "immediate action" from the licensee if the K-Mart manager believes that the licensee has not provided "sufficient help, or if any employees are inefficient or objectionable" (R. 15; R. Tr. 235, Er. X. 2, p. 2). Under the heading "General Operation of Store," a licensee is directed "Not [to] permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operation of other Licensees or Licen-

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[10] At the representation hearing, Kenneth G. Sanger, merchandise manager and director of K-Mart's Western Region, declared that without the delegation of over-all responsibility to K-Mart's manager "there would be complete chaos" (R. Tr. 235).

sor" (R. 15; Er. X. 2, p. 2). Although the Rules and Regulations declare all hiring and terminations to be under the supervision of each licensee's manager, they authorize K-Mart's personnel supervisor to receive applications from persons desiring employment (R. 15; Er. X. 2, p. 1). Such applications are to be made available to the licensees on request (R. 15; Er. X. 2, p. 1). Under the Rules and Regulations, each party to the licensing agreement agrees that it will not "hire an employee or former employee of the other without first checking" with the other (R. 15; Er. X. 2, p. 1). The Rules also require licensees' employees to attend briefing and training sessions "to familiarize themselves with store policies and regulations pertaining to the conduct of the business in their department, as well as the entire operation" (R. 15; Er. X. 2, p. 3). In addition, the Rules require each licensee to operate its department during hours fixed by K-Mart (R. 15; Er. X. 2, p. 2). K-Mart's Regulations also include provisions for employee discipline,[11] smoking restrictions, rest periods, places where employees are permitted to keep their personal belongings, employee purchases,[12] employee

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[11] Employees are forbidden to do "anything that might bring criticism of themselves or the store." More specifically, "only the strictest business relations" are permitted between male and female employees; employees are required to "avoid loud talking across the store, chewing gum, using too much make-up, [or visiting] with friends while on duty. Husbands or wives of employees shall not spend excessive time in the store." The Rules also provide that unauthorized use of emergency exits shall be cause for dismissal.

[12] "*Employee Purchases.* All store purchases by employees must be taken unsealed to a supervisor designated by the

wearing apparel and identification badges,[13] and the greeting of customers (R. 15; R. Tr. 101-103, 184-188, Er. X. 2).

2. *The Regional Director's Supplemental Decision and Direction*

On April 7, 1965, the Regional Director conducted an election among the employees at K-Mart's Commerce store (R. 307; 153, 109). The tally of ballots showed that there were approximately 80 eligible voters and that 79 ballots were cast. Of these, 37 were in favor of, and 33 against representation by the Union; 9 ballots were challenged (R. 153; 109). The challenged ballots were sufficient in number to affect the results of the election (R. 307; 153, 109). The Union and K-Mart filed timely objections to conduct affecting the results of the election (R. 307; 153, 110-121, 163-168). Pursuant to the Board's Rules and Regulations,[14] the Regional Director conducted an

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Licensor. Such purchases will be sealed with the register tape and be available to be detached by the person who approves packages taken from the store" (Er. X. 2, p. 1).

[13] Male employees are required to wear ties and coats; female employees to wear "uniform smocks or aprons," to be laundered at licensee's expense.

[14] Section 102.69(c), Series 8, as amended (29 C.F.R. 102.69(c)). These rules provide, in pertinent part:

> If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges or both. * * * If the election has been conducted pursuant to a direction of

administrative investigation of the challenges and objections, without a hearing. On June 30, 1965, following this investigation, the Regional Director issued his Supplemental Decision and Direction, sustaining challenges to 4 ballots, overruling challenges to 5 ballots and ordering that they be opened and counted, finding all of the Union's objections to be without merit, and finding all but one of the Employers' objections to be without merit (R. 307; 153-162). The Regional Director further ordered that if the revised tally showed that a majority of valid ballots had been cast for the Union, the election should be set aside on the basis of an Employer's objection he found meritorious (pp. 15-17, *infra*), and a new election conducted as a subsequently designated time (R. 307; 162). The instant proceeding is concerned only with the Union's challenge to the ballot of R. Pentecost, and the Employers' objections. The pertinent substance of the Regional Director's decision is summarized below:

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election issued following any proceeding under Section 102.67 [as was the case here], the regional director may * * * exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director.

a. R. Pentecost's challenged ballot

The Union challenged R. Pentecost's ballot, contending that he was not employed in the bargaining unit on the eligibility date fixed by the Regional Director's Direction of Elections (R. 153, 154). The Regional Director's Direction of Elections provided in pertinent part (R. 21-22):

> Elections by secret ballot will be conducted by the undersigned . . . at the time and place set forth in the notice of election to be issued subsequently . . . . Eligible to vote are those in the units who were employed during the payroll period immediately preceding [February 24, 1965]."

The Regional Director's investigation revealed, and it is undisputed, that F & G's payroll period ran from Thursday until Wednesday (R. 155). Thus, February 24, 1965, a Wednesday, was the last day of an F & G payroll period (R. 155). Prior to the date of the election, the Regional Director issued a notice of election (R. 99) which declared the eligibility date to be the last day of the "payroll period ending prior to February 24, 1965." Thus, under the Regional Director's Direction of Elections and the subsequent notice of elections, the eligibility date for F & G employees was February 17, 1965. The Employers did not question that this was the eligibility date, but claimed that Pentecost was a unit employee on and after that date (R. 154). The facts as found by the Regional Director, on the basis of his administrative investigation, are undisputed, and are as follows:

At the time of the election, on April 7, 1965, Pentecost was employed at the Commerce store by F & G Merchandising as a mechanic in the automotive department (R. 154). However, F & G hired him on or about February 1, 1965, at K-Mart's Costa Mesa, California, store, on the recommendation of Richard Wall, then a manager-trainee scheduled to be appointed F & G's manager at K-Mart's Commerce store within a few weeks (R. 154-155). Wall sought Pentecost as his mechanic for the Commerce store, and requested that he be hired and trained at the Costa Mesa store pending Wall's transfer to Commerce (R. 155). Wall became manager of F & G's Commerce operation on February 18 (R. 155). Pentecost began working at Commerce, and Wall put his name on the payroll for the first time, on February 19, 1965, two days after the eligibility date fixed by the Regional Director's Decision and Direction of Election issued on Wednesday, February 24, 1965 (R. 155). Not until April 30, 1965, did F & G Merchandising charge Pentecost's Costa Mesa wages to its Commerce operation (R. 155).

On the basis of the foregoing, the Regional Director found that Pentecost did not become an employee at F & G's Commerce operation until February 19, 1965, two days after the eligibility date (R. 155). Accordingly, the Regional Director concluded that Pentecost was ineligible to vote, and sustained the Union's challenge to his ballot (R. 155).

b. The Employers' Objections

1) In the first of their six objections, the Employers alleged that on several occasions during March

and April 1965, Union representatives threatened employees with loss of employment if they did not join or support the Union, or if they opposed it (R. 157-158; 110-111). The Regional Director found the following, on the basis of his investigation:

In one of two incidents, a Union representative told an employee, "If you don't join and the Union is voted in, you will lose your job" (R. 158). In the second incident, an unidentified person told an employee, in a telephone conversation, that the Union would succeed in the forthcoming election, and that if she did not vote for the Union, she would lose her job (R. 158). The Union representative involved in the first incident denied making any threat but asserted that in some instances he told employees that the Union's contracts contained union membership provisions requiring membership after thirty days as a condition of employment (R. 158).

From the foregoing, the Regional Director concluded that there was insufficient evidence to substantiate this objection (R. 158).

2) In their second objection, the Employers alleged that during March and April 1965, and at earlier times, the Union's representatives threatened employees with physical violence and other reprisals if they did not support the Union, and, further, that the Union maintained constant surveillance of the employees' activities (R. 158; 111). In support of this objection the Employers presented evidence that an employee told his supervisors that he had been threatened (R. 158). The Employers also offered the testimony of an employee who allegedly overheard a con-

versation between the first employee and a Union representative in the store's parking lot approximately one week before the election (R. 158). The Union representative offered the employee some campaign literature, which the latter refused, adding that he didn't want the Union representative bothering him at his house (R. 158). The Union representative replied, "You we don't want. You'd better hope the union doesn't get in" (R. 158).

The Regional Director's investigation revealed that a Union representative visited the allegedly threatened employee once prior to the reported parking lot incident, and a second time on the day prior to the election, on the employee's express invitation (R. 158). Further, the employee denied that he was threatened and declared (R. 158):

> I told [the store manager] and others that I was scared of the union. I had no reason for this. I just felt that way. I had never heard from anyone that the union had threatened them.

Finally, the Union representative who allegedly made the threat denied having done so (R. 158). From his investigation, the Regional Director concluded that the Employers' second objection was without merit (R. 158).

3) In their third objection, the Employers contended that just prior to the election, the Union distributed a leaflet to employees which contained "deliberately false and misleading comparisons of wages and benefits allegedly received by employees of other employers under a 'union' contract for like work"

which "were sufficiently material to influence the employees in their determination as to how to vote . . ." (R. 158-159; 112).

The Regional Director's investigation revealed that on either April 5 or April 6, 1965, the Union distributed to employees a leaflet which gave a comparison of wage rates in various job classifications between stores under union contract and K-Mart's Commerce store (R. 159).[15] The Regional Director also found that the Union had mailed a letter to unit employees on March 26, 1965, with an attachment listing union wage rates for employees with "1 year of service," in the same classifications as were listed in the pre-election leaflet (R. 159; 170-171). The Employers contended that the leaflet was false and misleading because some K-Mart employees enjoyed an hourly wage scale higher than $1.80, and further because the union wages shown were received by employees only after one year's employment, a fact which the leaflet failed to disclose.

The Regional Director found that the K-Mart rates set forth in the leaflet were average wage rates, that the Union had no special knowledge of the actual rates at K-Mart, and that the employees had inde-

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[15] The Union's leaflet contained the following comparison (R. 169):

	Wages Paid		Difference to you		
Job	K-Mart	Union	hourly.	wkly.	yrly.
Checker	$1.80	$2.35	plus .55	$22.00	$1144.00
Houseware	$1.80	2.20	plus .40	16.00	832.00
Stock Room	$1.80	2.10	plus .30	12.00	624.00
Payroll Clk.	$1.80	2.30	plus .50	20.00	1040.00

pendent knowledge with which to evaluate the Union's assertions in this regard (R. 159). Upon these facts, he concluded that the figure representing K-Mart wages in the leaflet was not a material misrepresentation and thus, did not impair the validity of the election (R. 159). However, the Regional Director, noting that K-Mart's Commerce store employed a substantial number of employees with less than one year's employment, sustained the objection on the ground that the leaflet failed to disclose that the union rates depicted were the highest of four wage progression rates within each job classification and were received by employees only after one year's employment (R. 160).

4) In their fourth objection, the Employers contended that during the eleven days preceding the election, the Union distributed a letter to the employees which misrepresented "the true facts in regard to the payment of union dues that would be required of K-Mart employees if the Union won the election" (R. 160; 112-113). As evidence supporting their contention, the Employers supplied an article published by a Union official in March 1965 (R. 160; 172-174).

The Union's letter, in pertinent part, advised the employees (R. 172):

> Your Union dues will be $5.00 per month.
>
> Upon the payment of this amount, you will receive full membership in our organization. We might add that you will not be required to pay any other fees, fines or assessments for member-

> ship in our organization. This includes the fact that you will not be required to pay double dues as some of the members have voluntarily voted to do.

The article upon which the Employers based their contention reported, in pertinent part, that a group of Union members had voted to support a Union strike fund by paying double dues (R. 174). The Regional Director found no conflict between the contents of the letter and the Union official's article (R. 160).

5) In the fifth of their objections, the Employers contended that the Union interfered with the employees' free choice by offering to waive its initiation fee in favor of each employee who voted for the Union in the representation election (R. 161; 113). In this objection, the Employers referred to the letter which was the subject of their fourth objection, and a card-sized certificate which the Union enclosed with the letter (R. 161; 172-174). In pertinent part, the Union's letter stated (R. 172):

> It has always been the policy of our Organization that we do not charge initiation fees of any kind to any newly organized members. This policy will apply to any K-Mart employee who becomes a member of our Union as the result of our winning the election at your store and who is employed there at the time the employees sign their first Union contract.

The letter also stated (R. 172), "The enclosed certificate is in furtherance of this policy . . . ." The accompanying certificate declared that the bearer would "not be required to pay initiation fees of any

kind, nor any fees other than the regular monthly dues, which shall not be required . . . until a union agreement has been signed by the employer after it has been voted upon by employees of the store and accepted by a majority vote" (R. 172-173).

The Regional Director overruled this objection upon the ground that the waiver of initiation fees set forth in the Union's letter and certificate was not conditioned upon how the individual employee would vote in the representation election, but was offered to all employees without exception (R. 161).

6) In their final objection, the Employers contended that on the morning of the election, April 7, 1965, an employee received a telephone call from a Union representative who asked if she were voting in the election and offered transportation for her convenience (R. 161-162; 113-116). The employee prolonged the conversation for about 2 hours, asking her caller, and then another Union representative, numerous questions relating to the payment of double dues, Union meetings, conditions of employment, fringe benefits, union security, the status of part-time employees, employees' rights to file a decertification petition against the Union after certification, the effects of a strike on job rights and income, and the Union's attitude toward a supervisor's display of favoritism toward an employee (R. 161). After the conversation, the employee wrote down her recollection of the questions and answers which had been exchanged over the telephone (R. 161; 175-178). The employee gave her written recollection to the assistant manager of the Commerce store, who, in conversation with her,

had previously expressed interest in obtaining answers to these questions from the Union (R. 161).

The Regional Director found that the answers, as written by the employee, contained certain misstatements concerning legal rights of employees and the Union's strike record (R. 161; 170-178).[16] The employee stated that during the reported conversation, the Union representatives told her to satisfy her doubts or disbeliefs by confirming their assertions with the employees of nearby White Front Stores or Food Giant Stores, who were covered by Union contracts (R. 161). The Regional Director concluded that "any misrepresentations described by the employee were a result of her own faulty recollection or interpretation and [were] not attributable to the [Union]" (R. 161-162). Finally, the Regional Director concluded that the alleged misrepresentations could not have "materially affected the results of the election" (R. 161-162).

3. *The Board's Decision on Review and Certification of Representative*

As previously noted, on June 30, 1965, the Regional Director issued his Supplemental Decision and Direction, ordering 5 challenged ballots opened and counted, sustaining Employers' Objection Number 3, and overruling all other objections filed by the Employers and the Union (R. 162). The Regional Director fur-

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[16] The Union representatives denied making the misstatements attributed to them, and the Regional Director credited their denials (R. 161).

ther ordered that if the revised tally showed a majority of valid ballots had been cast for the Union, the election would be set aside and a new election conducted at a subsequently designated time (R. 162). Section 102.69(c) of the Board's Rules and Regulations (29 C.F.R. Sec. 102.69(c)) provides that if the regional director issues a decision on objections or challenges, the parties shall have the rights set forth in Section 102.67 (29 C.F.R. Sec. 102.67). Sec. 102.67(c) and (d)) provides as follows:

> (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:
>
> (1) That a substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from officially reported Board precedent.
>
> (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
>
> (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.
>
> (d) Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record. With respect to ground (2), and other grounds where appropriate, said

request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument.

Section 102.67(f) provides, in part, that "Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

The Employers filed timely requests for review of the Regional Director's ruling on R. Pentecost's ballot, and his overruling of Employers' Objection 1, 2, 4, 5, and 6 (R. 307; 287, 191-259). The Union requested review of the Regional Director's rulings on three challenged ballots and his sustaining of the Employers' third objection (R. 307; 287, 179-190). On July 19, 1965, the Board granted the Union's request for review insofar as it related to the Regional Director's sustaining of the Employers' third objection, denied the requests for review in all other respects on the ground that they raised "no substantial issues warranting review", and directed the Regional Director to open and count the challenged ballots as provided in his Direction (R. 307; 287, 271). The Board also provided in its order of July 19, 1965, that it would review the Regional Director's disposition of Employers' Objection 3, in the event the Union received a majority of the ballots in the revised tally (R. 307; 271). On July 23, 1965, the Regional Director opened and counted the five remaining ballots and issued a revised tally of ballots which showed that of approximately 80 eligible voters, 75 cast bal-

lots, of which 38 were for, and 37 against the Union (R. 307; 287-288, 272).

On September 9, 1965, the Board issued its Decision on Review and Certification of Representative, reversing the Regional Director's disposition of the Employers' third objection (R. 307; 287-289). In its decision on review, the Board concluded, contrary to the Regional Director, that the omission of the one-year experience qualification on the union rates listed in the Union's pre-election leaflet did not "constitute a basis for setting aside the election" (R. 307; 288-289). Consequently, the Board overruled the Employers' third objection, and certified the Union as the employees' collective bargaining representative (R. 307; 289).

B. *The Unfair Labor Practice Proceeding*

By letter dated September 21, 1965, the Union requested K-Mart to meet with it for purposes of collective bargaining (R. 327; G.C.X. 41(a)). In its answering letter of September 29, 1965, K-Mart refused the request, declaring, *inter alia*:

> It is the position of the S. S. Kresge Company that the unit of employees for which your Union seeks to act as the collective bargaining representative at our Commerce store is inappropriate and that, furthermore, the employees in such a unit have not, by a free, untrammeled and uncoerced majority selected your Union as their collective bargaining representative (R. 327, 307-308; G.C.X. 41(b)).

By separate letters, dated October 18, 1965, the Union requested Gallenkamp, Mercury, Acme, F & G,

Hollywood and Besco to meet with it for purposes of collective bargaining in the unit found appropriate by the Regional Director (R. 327, 307; G.C.X. 42(a), 43(a), 44(a), 45(a), 46(a), 47(a)). All of these employers refused to comply with the Union's request (R. 327, 307; G.C.X. 42(b), 43(b), 44(b), 45(b), 46(b), 47(b)). However, Besco replied that it had discontinued its business operations at K-Mart's Commerce store on March 30, 1965, and would not be involved in collective bargaining at that store (R. 307; G.C.X. 46(b)).

In a final letter to K-Mart, dated October 19, 1965, the Union requested bargaining, stating (R. 327, 308; C. Tr. 35-36, G.C.X. 48):

> So that there is no misunderstanding about the request made by the Union, this is to confirm the fact that the Union's request to bargain was a request upon your client to bargain in the *unit found appropriate by the Board.* (Emphasis in the original.)

K-Mart did not reply to this last request (R. 327, 308; C. Tr. 35-36).

On December 10, 1965, the General Counsel issued a complaint against the Employers (including Besco), alleging, *inter alia*, that the Union was properly certified as collective bargaining representative of a unit of the employees employed at K-Mart's Commerce, California, store; that since September 21, 1965, the Union had requested the Employers to bargain with it for this unit, and that they had refused to bargain with the Union in violation of Section 8

(a)(5) and (1) of the Act. (R. 305; 293-296). The complaint also asserted that Zale Jewelry Service, Inc. was operating the same department which Besco operated at K-Mart's Commerce store prior to March 30, 1965 (R. 308-309; 294).[17] K-Mart and Hollywood Hat, in their respective answers, and Gallenkamp, Mercury, Acme and F & G, in their answer, admitted refusing to bargain with the Union, but denied, *inter alia*, the allegations that the employees at K-Mart's Commerce store constituted an appropriate unit; that a majority of the employees at the Commerce store had voted for the Union as their collective-bargaining agent; and that the Union had requested the Employers to bargain with it as the collective-bargaining representative of the certified store-wide unit (R. 305, 308; 297-304).

At the unfair labor practice hearing, the Trial Examiner refused to permit the Employers to relitigate issues which had been fully litigated in the underlying representation proceeding, upon the ground that the Board's certification of the Union disposed of those issues (R. 308; C. Tr. 37-39). The Trial Examiner also rejected the Employers' contentions that the Union's bargaining demand was defective because it made no demand upon Zale Jewelry Service, Inc., and that the certification was invalid and the complaint defective inasmuch as they did not name Zale as a joint employer (R. 308-309). The Trial Examiner found that the Employers refused to bargain in violation of Section 8(a)(5) and (1) of the Act (R. 310).

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[17] The complaint did not name Zale Jewelry Service, Inc. as a respondent (R. 309; 293).

II. The Board's Conclusions and Order

The Board adopted the Trial Examiner's finding that the Employers violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union (R. 324-327). Accordingly, the Board directed the Employers to cease and desist from the unfair labor practices found, to bargain collectively with the Union upon request,[18] and to post appropriate notices (R. 327-328, 310-313).

SUMMARY OF ARGUMENT

I. The Board's determination that K-Mart and its licensees are joint employers, so that a store-wide unit of employees at K-Mart's Commerce store comprises an appropriate bargaining unit, constituted a reasonable exercise of the Board's discretion. Section 9(b) of the Act affords the Board great latitude in determining the unit appropriate for purposes of collective bargaining, and the Board's unit determination should not be disturbed by this Court unless it is arbitrary or capricious. *Foreman & Clark, Inc.*, v. *N.L.R.B.*, 215 F. 2d 396, 405-406 (C.A. 9), cert. denied, 348 U.S. 887.

K-Mart's Commerce store includes several departments which are operated by licensees pursuant to

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[18] The Board noted and corrected the Trial Examiner's inadvertent inclusion of Besco's employees in the description of the bargaining unit in his "Conclusion of Law" (R. 326 n. 5). The Board further modified the Trial Examiner's unit description by deleting the names, "Gallenkamp, Mercury, Acme, F & G, Hollywood", and thus conforming the unit description to that found appropriate in the representation proceeding (R. 326 n. 5).

uniform written agreements with K-Mart. The licensed departments operate as integral parts of the Commerce store. K-Mart and its licensees conduct their business in accordance with rules and regulations promulgated by K-Mart covering a number of employment conditions within the area of mandatory collective bargaining. Further, K-Mart has broad authority to amend, modify or revise such rules and regulations. Finally, K-Mart has directed its licensees to settle labor disputes which interfere with the Commerce store's operations. When coupled with K-Mart's right to terminate the license of a disobedient licensee, K-Mart's rule-making power, both exercised and potential, render it a necessary party to any collective bargaining which may affect the terms and conditions of employment enjoyed by its licensees' employees at Commerce. In these circumstances, the Board reasonably found K-Mart and its licensees to be joint employers. *N.L.R.B.* v. *Checker Cab Company*, 367 F. 2d 692, 696-698 (C.A. 6), cert. denied, 385 U.S. 1008; *N.L.R.B.* v. *S. E. Nichols Company*, 380 F. 2d 438, 439 (C.A. 2).

K-Mart's Commerce store resembles a single, integrated department store. Further, K-Mart and its licensees constitute joint employers of the employees in the licensees' departments. There is no bargaining history for any of the employees, and no other labor organization seeks to represent the employees of any licensee separately. In these circumstances, the determination that a storewide unit constitutes an appropriate unit conformed to the Board's long established policy in cases involving retail department

stores. See e.g., *Stern's Paramus*, 150 NLRB 799, 803.

II. Substantial evidence supported the Board's finding that F & G employee R. Pentecost was ineligible to vote in the election of April 7, 1965. Thus, the evidence shows that R. Pentecost did not report for work, nor appear on the payroll, at F & G's Commerce location until February 19, 1965, two days after the eligibility date which was fixed by the Regional Director in accordance with Board practice. Accordingly, the Board reasonably concluded that R. Pentecost was ineligible to vote in the representation election of April 7, 1965.

III. The Board acted reasonably and within its discretion in overruling the Employers' objections based upon alleged threats of reprisals in three incidents. In the first incident, a Union representative's statement to an employee that "if you don't join and the Union is voted in, you will lose your job," related only to union membership and was not conditioned upon how the employee voted. The second incident was a telephoned threat from an unidentified caller who threatened an employee with loss of employment if she did not vote for the Union. In such circumstances, his threat was insufficient to create an atmosphere of fear and reprisal. *Orleans Mfg. Co.*, 120 NLRB 630, 633-634. Further, assuming the Union's responsibility for the telephoned threat, the employee, upon reflection, would recognize that loss of employment could not be effectuated except in the unlikely event of K-Mart's acquiescence and cooperation. *Otis Elevator Company*, 114 NLRB 1490.

In the third incident, a Union representative warned an employee "You we don't want. You'd better hope the Union doesn't get in." It is most likely that such a statement would have induced the employee to vote against the Union. Accordingly, the Board properly rejected this warning as ground for setting the election aside.

The Board properly refused to find that the three instances of threats, taken together, created a general atmosphere of fear and reprisal. For, the impact of each of the three alleged remarks was limited to one employee in the unit of 80 voters, and a fourth employee who overheard one of them. Finally, such antagonizing conduct would tend to influence the employees to vote against the Union. Under these circumstances, the Board was not required to set aside the election. *Macomb Pottery Company* v. *N.L.R.B.*, 376 F. 2d 450, 454 (C.A. 7).

IV. The Board acted reasonably and within its discretion in ruling that the Union's preelection propaganda did not invalidate the election. The Union's leaflet of April 5 or 6 was substantially accurate in its comparison of wage rates in various job categories between K-Mart and similar stores under union contract. The Union's failure to state that the union rates were received by employees only after one year's employment, and that some K-Mart employees received more than the $1.80 which it depicted as K-Mart's hourly rate, did not constitute substantial departures from the truth likely to impair the employees' free choice. For, as the Board observed, the Union had previously informed the employes of the

one-year experience qualification on union rates in the area; and, further, the employees had independent knowledge of K-Mart's wage rates. Accordingly, the Board properly applied its settled policy, approved by the courts, not to set an election aside because of campaign misrepresentations unless it finds it likely that such utterances had a significant impact on the election. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60-61.

The Union's pre-election letter to employees announcing that they would not be required to pay double dues was not contradicted by an article published by the Union in its newspaper at about the same time, announcing that some Union members had voted to pay double dues to support a strike fund. Further, the Employers did not present any other evidence to support their allegation that the Union's announcement was false. Accordingly, the Board properly found no merit in the Employer's contention. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124.

The alleged misrepresentations made by Union representives to employee Carol Platteborze on the morning of the representation election could not have had any impact on the election in view of her demonstrated alignment with K-Mart and the absence of further dissemination of the alleged misrepresentations to other employees. Finally, the Union's pre-election announcement of its waiver of initiation fees, which was conditioned upon the election victory and the signing of a collective-bargaining contract and not on how an employee voted in the election, did not im-

properly influence the employees' votes. *Macomb Pottery Company* v. *N.L.R.B.*, 376 F. 2d 450, 455 (C.A. 7).

V. The Board properly found that the Employers violated Section 8(a)(5) and (1) of the Act by their refusals to bargain with the Union. The Employers' refusal to bargain with the certified Union is not justified by the inclusion of Besco and the exclusion of Zale from the certified unit, or by the naming of Besco as a joint employer in the Union's demand for bargaining, its amended unfair labor practice charge, or in the complaint.

The Employers may not rely upon the substitution of Zale Jewelers for Besco as a licensee to defend their refusal to bargain; for no employees of either Zale or Besco voted in the election, the Board was not aware of the cessation of Besco's operations or the commencement of Zale's operations until the unfair labor practice proceeding herein, and the Employers withheld their immediate knowledge of these changed circumstances until that proceeding. Nor did the Employers request the Board to clarify its certification as provided under the Board's Rules and Regulations. Finally, although the charge and complaint named Besco as a respondent, this error was corrected by the General Counsel's declaration that no bargaining order was sought against Besco, and the exclusion of Besco from the Board's order.

The Union's letters to K-Mart and each of the Commerce store's licensees specifically mentioned the certification, stated that the certification was "for the employees in the K-Mart store," and then requested

"discussions" leading to a collective bargaining agreement. Further, the Employers understood that the Union was making a bargaining demand as the certified representative of a unit of their employees. In these circumstances, the Board properly rejected the Employers' contention that the Union's demands for bargaining were fatally defective. *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908 (C.A. 9), cert. denied, 379 U.S. 961.

ARGUMENT

I. The Board's Determination That K-Mart and Its Licensees Are Joint Employers, so That a Storewide Unit of Employees at K-Mart's Commerce Store Comprises an Appropriate Bargaining Unit, Constituted a Reasonable Exercise of the Board's Discretion

The Employers have concededly refused to bargain with the duly elected and certified representative of the employees at K-Mart's Commerce store. The Employers defend their refusal on the ground, among others, that the Board erred in finding that a storewide unit of all employees at the Commerce store constitutes an appropriate unit for collective bargaining purposes. Specifically, the Employers object, first, to the finding that K-Mart and its licensees are joint employers of the employees in each of their respective departments, and, second, to the inclusion of F & G Merchandising in the store-wide unit. The Employers argue that K-Mart and each of its licensees are separate employers and thus a store-wide unit is inappropriate for purposes of collective bargaining. A further argument urged by the Employers is that even if K-Mart and its licensees are joint employers,

the employees of F & G Merchandising should not be included in the unit because they lack a sufficient community of interest with the other unit employees.

Section 9(b) of the Act provides that "The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." [19] This Court has long recognized that "[G]reat latitude is given to the Board in determining 'the unit appropriate for the purposes of collective bargaining' " and that the Board's unit determination will not be disturbed unless it is arbitrary or capricious. *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405-406, cert. denied, 348 U.S. 887. Accord: *Packard Motor Car Co.* v. *N.L.R.B.*, 330 U.S. 485, 491; *May Department Stores Co.* v. *N.L.R.B.*, 326 U.S. 376, 380; *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111, 134; *N.L.R.B.* v. *Merner Lumber & Hardware Co.*, 345 F. 2d 770, 771 (C.A. 9), cert. denied, 382 U.S. 942; *N.L.R.B.* v. *Deutsch Co.*, 265 F. 2d 473, 478 (C.A. 9), cert. denied, 361 U.S. 963; *N.L.R.B.* v. *Service Parts Co.*, 209 F. 2d 905, 907 (C.A. 9); *S. D. Warren Co.* v. *N.L.R.B.*, 353 F. 2d 494, 497-498 (C.A. 1), cert. denied, 383 U.S. 958; *N.L.R.B.* v. *Checker Cab Company*, 367 F. 2d 692, 697-698 (C.A. 6), cert. denied, 385 U.S. 1008; *Retail, Wholesale, and Department Store Union* v. *N.L.R.B.*, 66 LRRM 2158, 2161, 56 L.C. para. 12,168 (C.A.

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[19] The pertinent text of Section 9(b) appears in the Statutory Appendix, *infra*, p. 73.

D.C.), Sept. 14, 1967). We show below that the Board's unit determination was neither arbitrary nor capricious but, rather, was a reasonable exercise of its broad discretionary authority.

A. *The Board reasonably determined that K-Mart and its licensees are joint employers*

As more fully set forth in the Counterstatement, *supra*, at pp. 6-10, and in the Regional Director's decision and direction of elections (R. 14-22), K-Mart's Commerce store includes several departments which are operated by licensees pursuant to uniform written agreements with K-Mart. The licensed departments operate as integral parts of the store, and to customers are identifiable only as departments of the K-Mart store. Under the uniform license agreement, K-Mart controls advertising, merchandising, and the physical arrangement of the store. K-Mart retains the right to audit the licensees' sales records; to handle all complaints, exchanges and refunds through its own service desk; and to control credit. The license agreement also requires licensees to comply with all local, state and Federal regulations, and more particularly those statutes which pertain to workman's compensation, and employee health and welfare benefits. Recognizing that the success of their "enterprise is dependent upon compliance with common standards," K-Mart and its licensees have agreed to conduct their business in accordance with Rules and Regulations, "as established from time to time by the Licensor" (*supra*, pp. 7-8). K-Mart's ultimate power is established by Paragraph 10 of the license agreement. Under its provisions, K-Mart alone has au-

thority to issue uniform Rules and Regulations "for the benefit of the common enterprise", and to amend, modify or revise them (*supra*, p. 8). Such Rules are to "govern," *inter alia*, "employment practices" and "personnel * * * policies." Violation of these Rules and Regulations subjects the offending licensee to termination of its license by K-Mart (Er. X. 1, p. 7).

Pursuant to its authority under the licensing agreement, K-Mart has promulgated Rules and Regulations under which K-Mart enjoys over-all control of the store's operations. These Rules include provisions relating to hiring and terminations, employee discipline, employee wearing apparel and identification badges, places where employees could keep purses and extra clothing, smoking, rest periods, and employee purchases. Licensees are required to operate their departments with "sufficient help" during hours established by K-Mart, which has thus substantially limited the licensees' power to vary or curtail its employees' working hours. Although all hiring and terminations are under the supervision of the licensees' managers, the Rules and Regulations authorize K-Mart's personnel supervisor to receive applications from persons seeking employment at the Commerce store, and to make such applications available to licensees upon their request. K-Mart and each licensee have also agreed to check with each other before hiring a present employee or former employee of the other. If K-Mart's manager determines that a licensee's employees are "inefficient or objectionable," the licensee must comply with the manager's "suggestion

for a correction of the condition" (R. 15; R. Tr. 235, Er. X. 2, p. 2). Finally, licensees are directed to "Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operations of other Licensees or Licensors" (*supra*, pp. 8-9).

In brief, K-Mart and its licensees have recognized the necessity for coordinated control of their "common enterprise," and have expressly provided for such control in their licensing agreement. Paragraph 10 of the licensing agreement vests K-Mart with broad over-all authority to promulgate uniform Rules and Regulations covering all aspects of the Commerce store's operation, specifically including labor relations. As we have shown, K-Mart has already exercised its authority with respect to a number of employment conditions within the area of mandatory collective bargaining.[20] Moreover, K-Mart's broad au-

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[20] Thus, working hours and work days are mandatory subjects of collective bargaining (*Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Co.*, 381 U.S. 676, 691). Under the current Rules and Regulations, licensees are required to operate their departments during hours established by K-Mart (Er. X. 2, p. 2). It also appears that K-Mart operates the Commerce store on Sundays (K-Mart Br. pp. 43-44).

Similarly, employee work loads are a mandatory subject of bargaining (*N.L.R.B.* v. *Bonham Cotton Mills, Inc.*, 289 F. 2d 903, 904 (C.A. 5)). Under K-Mart's Rules and Regulations, K-Mart may prescribe the number of employees it deems necessary to operate a licensee's department (Er. X. 2, p. 2).

Moreover, hiring practices and tenure of employment may be mandatory subjects of collective bargaining (*N.L.R.B.* v. *Houston Chapter, Associated General Contractors of America,*

thority to "amend, modify or revise" the current Rules and Regulations with respect to employment conditions empowers it to withhold or nullify the licensees' power to obligate themselves during bargaining with the Union about such matters. Finally, K-Mart has directed its licensees to settle labor disputes which interfere with the operation of the Commerce store. When coupled with K-Mart's right to terminate the license of a disobedient licensee, K-Mart's rule-making power, both exercised and potential, would preclude the Union from safely relying on bargaining commitments by the licensees so long as K-Mart remained free from the statutory bargaining obligation which the Board has imposed on it. In these circumstances, we submit, the Board's finding that K-Mart and its licensees are joint employers can hardly be deemed arbitrary or capricious. *N.L.R.B.* v. *Checker Cab Company, supra*, 367 F. 2d at 696-698; *N.L.R.B.* v. *S. E. Nichols Company*, 380 F. 2d

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349 F. 2d 449, 451-452 (C.A. 5), cert. denied, 382 U.S. 1026; *N.L.R.B.* v. *Tom Joyce Floors, Inc.*, 353 F. 2d 768, 769-771 (C.A. 9)). Under the Rules and Regulations, neither K-Mart nor a licensee can hire an employee or former employee of the other without first checking with the latter (Er. X. 2, p. 1).

Finally, company rules concerning coffee breaks, lunch periods, smoking, employee discipline, and dress are mandatory bargaining subjects (*Winter Garden Citrus Products Cooperative* v. *N.L.R.B.*, 238 F. 2d 128, 129 (C.A. 5), enforcing in this respect 114 NLRB 1048, 1060-1065; *Lloyd Fry Roofing Co.* v. *N.L.R.B.*, 216 F. 2d 273, 274, 276 (C.A. 9)). K-Mart's Rules and Regulations contain provisions governing these and other similar working conditions for all employees at the Commerce store.

438, 439 (C.A. 2).[21] On the contrary, the Board's decision merely recognized the pattern established by the Employers. In sum, the Board has recognized that K-Mart is a necessary participant in any collective bargaining which may affect the terms and conditions of employment enjoyed by its licensees' employees at Commerce. Having created this arrangement, the Employers cannot now dispute the industrial realities which flow from it.

The Employers' contention (K-Mart Br. 20-23, Gallenkamp Br. 25-27, Hollywood Br. 13) that the Board's order requiring them to bargain with the Union as joint employers will have a highly disruptive effect upon the store's operation is without any support in the record. Compare *N.L.R.B.* v. *Mead Foods, Inc.*, 353 F. 2d 87 (C.A. 5) in which the Fifth Circuit rejected speculation as to "asserted practical difficulties which may arise from having to bargain with two locals rather than one;" see also, *Pacific Coast Assn. of Pulp and Paper Mfrs.* v. *N.L.R.B.*, 304 F. 2d 760, 765-766 (C.A. 9). Moreover, it is reason-

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[21] For similar Board findings of joint-employers in representation proceedings, see *Frostco Super Save Store, Inc.*, 138 NLRB 125, 126-128; *United Stores of America and Collins Mart, Inc.*, 138 NLRB 383, 384-385; *Spartan Department Stores*, 140 NLRB 608, 609-610; *K-Mart, A Division of S. S. Kresge Company*, 159 NLRB No. 28 (where the petition covered K-Mart's San Fernando, California, store, and the parties stipulated (159 NLRB No. 28, n. 3) that the record made in the representation proceeding now before the Court in the instant case correctly represented the facts insofar as they were pertinent to the San Fernando K-Mart); *Thriftown, Inc.*, 161 NLRB No. 42; *K-Mart Division of S. S. Kresge Company*, 161 NLRB No. 92; *Jewel Tea Co., Inc.*, 162 NLRB No. 44.

able to expect that the Employers' accommodation of their diverse business policies to meet the needs of their joint enterprise, as is embodied in the uniform license agreement, would find its parallel in their bargaining with the Union. Contrary to the suggestion of the Employers (except K-Mart) (Gallenkamp br. p. 26, Hollywood br. p. 12 n. 1), the Board's finding that they are joint employers for collective bargaining purposes does not imply that they are all automatically answerable for other unfair labor practices (such as discriminatory discharges) which one of them may commit solely in furtherance of its own ends. See, *Majestic Molded Products, Inc.* v. *N.L.R.B.*, 330 F. 2d 603, 607 (C.A. 2).

In support of their contention that K-Mart and its licensees are not joint employers, the Employers rely upon those facts which appear to show separate supervision and control of working conditions for their own employees (K-Mart, Br. 32-38, Gallenkamp Br. 16-25; Hollywood Br. 13). From those facts, the Employers argue the applicability here of cases [22] in which, because of the absence of control by the licensor of the licensee's labor relations or employment conditions, the Board has refused to make a joint-employer finding. However, as is evident from the foregoing discussion of the license agreement and the Rules and Regulations which govern the working conditions and labor relations in the licensed departments here, those cases are inapposite.

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[22] *Esgro Anaheim, Inc.*, 150 NLRB 401; *Bab-Rand Co.*, 147 NLRB 247; *S.A.G.E., Inc. of Houston*, 146 NLRB 325.

B. *The determination that a store-wide unit of the employees at K-Mart's Commerce store, including the employees of F & G Merchandising, constituted an appropriate bargaining unit was a reasonable exercise of discretion*

As shown above, at p. 7, K-Mart's Commerce store resembles a single, integrated department store. Further, K-Mart and its licensees, including F & G Merchandising, constitute joint employers of the licensees' departments. Moreover, there is no bargaining history for any of the employees, and no other labor organization seeks to represent the employees of F & G or of any other licensee separately (R. 16). These conditions, standing alone, point to the propriety of the store-wide unit.[23]

The Employers (except K-Mart) contend, however, that the automotive mechanics and service employees, comprising F & G Merchandising's department, should be excluded from the unit because they lack sufficient community of interest with other unit employees (Gallenkamp Br. 27-30; Hollywood Br. 13). In support of their position, the Employers point to a variety of factors, including differences in function and conditions of employment between F & G's employees and the employees of the other departments; the uniforms which set F & G's employees apart; and the separate lounge and toilet facilities used by F & G's employees (Gallenkamp Br. 27; Hollywood Br. 13). Although the factors urged by the Employers

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[23] See, e.g., *Thrifttown, Inc.*, 161 NLRB No. 42; *Jewel Tea Co., Inc.*, 162 NLRB No. 44; *K-Mart Division of S.S. Kresge Company*, 161 NLRB No. 92; *Montgomery Ward & Company*, 78 NLRB 1070.

suggest that a separate unit of automotive mechanics and service employees might also be appropriate,[24] no labor organization seeks to represent such a unit separately. In these circumstances, the determination that a storewide unit constituted an appropriate unit conformed to the Board's long established policy in cases involving retail department stores. See e.g., *Stern's Paramus*, 150 NLRB 799, 803; *J. W. Mays, Inc.*, 147 NLRB 968, 972; *Polk Brothers, Inc.*, 128 NLRB 330, 331; *May Department Stores Company, Kaufmann Division*, 97 NLRB 1007, 1008. Thus, under this policy, the Board has treated a retail department store as a "plant unit" within the meaning of Section 9 of the Act, *supra*.[25]

This longstanding Board policy is, we submit, fully responsive to the statutory command in Section 9(b) that the Board make its appropriate-unit determinations "in order to secure to employees the fullest freedom in exercising the rights guaranteed by [the Act] . . . ." Thus, where, as here, no other labor organization seeks to represent F & G's employees sepa-

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[24] See, e.g., *Montgomery Ward & Co., Incorporated*, 150 NLRB 598; 601; *Bamberger's Paramus*, 151 NLRB 748, 751.

[25] The Board has long recognized the presumptive appropriateness of a single-plant unit. *Beaumont Forging Co.*, 110 NLRB 2200, 2201-2202; *Fredrickson Motor Express Corp.*, 121 NLRB 32, 33; *Temco Aircraft Corp.*, 121 NLRB 1085, 1088, n. 11; *Dixie Belle Mills, Inc.*, 139 NLRB 629, 631; *Liebmann Breweries, Inc.*, 142 NLRB 121, 125. See, *Sav-on Drugs, Inc.*, 138 NLRB 1032, 1033. See also, *e.g., N.L.R.B.* v. *Schill Steel Products*, 340 F. 2d 568, 574 (C.A. 5); *Harris Langenberg Hat Co.* v. *N.L.R.B.*, 216 F. 2d 146, 147-148 (C.A. 8).

rately, the Board could reasonably believe that this "fullest freedom" would not be promoted by barring such a group from joining with all the other store employees in exercising the right to select a collective bargaining representative. Indeed, were the Board to exclude F & G's employees from the unit, it is a matter of speculation as to whether any labor organization would undertake to represent such a residual group separately.[26] In view of these considerations, the determination that the store-wide unit was appropriate lies well within the Board's discretion.[27] *Cf.*

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[26] The Employers (except K-Mart) argue that the inclusion of F & G's employees in the store-wide unit conflicts with a line of Board cases which hold that separate units of automotive service departments are appropriate (Gallenkamp Br. pp. 28-30). However, in each of the cases cited by the Employers, a labor organization sought to represent such a department apart from other store employees. That such a fraction of the store-wide unit would itself constitute an appropriate bargaining unit does not detract from the validity of the broader unit, which is also an appropriate unit. *N.L.R.B.* v. *Smith*, 209 F. 2d 905, 907 (C.A. 9); *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 405 (C.A. 9), cert. denied, 348 U.S. 887; *N.L.R.B.* v. *Quaker City Life Insurance Company*, 319 F. 2d 690, 693 (C.A. 4); *Mountain States Telephone and Telegraph Co.* v. *N.L.R.B.*, 310 F. 2d 478, 480 (C.A. 10), cert. denied, 371 U.S. 875; *N.L.R.B.* v. *Charles Smythe, et al.*, 212 F. 2d 664, 667-668 (C.A. 5); *Harris Langenberg Hat Company* v. *N.L.R.B.*, 216 F. 2d 146, 148 (C.A. 8); *Mueller Brass Company* v. *N.L.R.B.*, 180 F. 2d 402, 405 (C.A. D.C.). *Cf. Georgia-Pacific Corporation*, 156 NLRB 946, 949-950.

[27] Thus, though the courts may feel that other election policies would "best effectuate" the controlling statute, the agency's choice of policies is entitled to affirmance as long as "there is nothing to suggest that in framing [them] the Board has exceeded its statutory authority." *Brotherhood of Rail-*

N.L.R.B. v. *Checker Cab Co.*, 367 F. 2d 692, 696-697 (C.A. 6), cert. denied, 385 U.S. 1008.

II. The Board Properly Found That R. Pentecost Was Ineligible to Vote in the Election of April 7, 1965

The validity of the Board's certification that the Union received a majority of the votes cast in the representation election rests upon the propriety of the Regional Director's determination that R. Pentecost, whose unopened ballot is sufficient to affect the results of the election,[28] was ineligible to vote. Questions of eligibility are basically factual, and it is well settled that the Board's determinations of factual disputes in the resolution of questions of representation are not to be disturbed if supported by substantial evidence. *N.L.R.B.* v. *Atkinson Dredging Company*, 329 F. 2d 158, 160 (C.A. 4), cert. denied, 377 U.S. 965; *N.L.R.B.* v. *Belcher Towing Company*, 284 F. 2d 118, 120 (C.A. 5); *Scobell Chemical Company* v. *N.L.R.B.*, 267 F. 2d 922, 924 (C.A. 2). As shown below, the evidence fully supports the Board's conclusion that R. Pentecost was ineligible to vote.

In accordance with Board practice,[29] the Regional

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way & Steamship Clerks, etc. v. *National Mediation Board*, 380 U.S. 650, 671. Accord: *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 332. See also, *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 619-621.

[28] As noted above, at pp. 22-23, the Revised Tally of Ballots shows that of 75 valid ballots counted, 38 were for and 37 were against the Union.

[29] See e.g., *B-W Construction Company*, 161 NLRB No. 146; *R. B. Butler, Inc.*, 160 NLRB No. 131. The Board's practice is guided by its desire to obtain a payroll, "which most

Director in his Direction of Elections, dated February 24, 1965, and in the subsequent notice of election, selected F & G's payroll covering the period immediately preceding that date as the basis for determining eligibility to vote. F & G's payroll period ran from Thursday to Wednesday. As February 24 was the last day of F & G's payroll period, the Regional Director followed the Board's usual procedure of selecting the first full payroll period before the date of a direction of election. *S. S. Kresge Company,* 121 NLRB 374, 385. Thus, to be eligible to vote in the election at the Commerce store, Pentecost must have been on F & G's Commerce payroll no later than Wednesday, February 17, 1965. *General Electric Company, supra,* 114 NLRB at 11; *Dura Steel Products Company,* 111 NLRB 590, 593. Cf. *Active Sportswear Co., Inc.,* 104 NLRB 1057. However, as shown in the Counterstatement, *supra* at p. 13, Pentecost was hired on February 1, 1965, at F & G's Costa Mesa location as a mechanic to be trained for later employment at F & G's Commerce store. It is conceded that Richard Wall, F & G's manager at Commerce, first assumed his duties at the Commerce store on February 18, 1965; and that Pentecost worked at the Costa Mesa store on February 17 and did not report for work at Commerce until Friday, February 19, 1965, when his name first appeared on F & G's Commerce payroll. Not until April 30, 1965,

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accurately list[s] the employees whose interests are involved, to serve as the basis for determining eligibility to vote." *General Electric Company,* 114 NLRB 10, 11-12.

over three weeks after the election, did F & G charge Pentecost's Costa Mesa wages to its Commerce operation. On the foregoing facts, the Board properly concluded that Pentecost was ineligible to vote in the representation election at the Commerce store.

Relying primarily upon the Board's decisions in *Rohr Aircraft Corporation*, 104 NLRB 499; and *Johnson City Foundry and Machine Works, Inc.*, 75 NLRB 475, the Employers (except K-Mart) argue that Pentecost's eligibility was established by F & G's intent to employ him at the Commerce store; his training status while at the Costa Mesa store; and the charging of Pentecost's wages, while at Costa Mesa, to F & G's Commerce operations (Gallenkamp Br. 32-33; Hollywood Br. 13). However, the Employers' reliance upon those decisions is misplaced. In *Rohr*, the Board found that certain employees were eligible to vote in a unit of the Company's Riverside plant employes because "employees on the payroll of the Riverside plant were training at the [Company's] Chula Vista plant . . . for jobs at the former plant. Their training assignment, if not already completed, is in the nature of a temporary detail." 104 NLRB at 502. Similarly, in *Johnson City* the Board found an employee eligible to vote where he was on the unit payroll and was on a temporary training detail outside the unit. 75 NLRB at 479.[30] However, those

[30] The Employers (except K-Mart) also seek support for their contention in *American Cyanamid and Chemical Corp.*, 11 NLRB 803, 806; *Great Lakes Steel Corp.*, 15 NLRB 510, 512; *Walton Lumber Co.*, 20 NLRB 573, 576; *Armour & Co.*, 15 NLRB 268, 279; *Quick Industries, Inc.*, 71 NLRB 949,

cases do not govern here. For, in the instant case, Pentecost was never employed at F & G's Commerce location nor included on its payroll until two days after the eligibility date. Further, the accounting entry transferring the charges for Pentecost's wages from F & G's Costa Mesa store to the Commerce store was not made until April 30, 1965, twenty-three days after the election (R. 155). Finally, neither Pentecost's training status, nor F & G's intent, nor its *post hoc* accounting entries, alter the determinative fact that Pentecost was neither employed at F & G's Commerce operation, nor listed on its Commerce payroll on February 17, 1965, the eligibility date properly fixed by the Regional Director's Direction of Elections.

III. The Board Reasonably Exercised Its Discretion in Finding That the Employers' Objections Did Not Warrant Setting Aside the Election

A. *Controlling Principles*

As the Seventh Circuit pointed out in *Rockwell Mfg. Co., Kearney Div.* v. *N.L.R.B.*, 330 F. 2d 795, 796-797, cert. denied, 379 U.S. 890:

950; and *E. J. Kelley Co.*, 99 NLRB 791, 792-793. However, such reliance is misplaced. For, in each of the cited cases, except *Walton*, the Board held that employees who were on the company's payroll, but were temporarily assigned to work outside the voting unit on the eligibility cut-off date, were eligible to vote. As for *Walton*, the Board in that case held that employees who had been temporarily removed from the company's payroll and transferred to work for another employer were in effect temporarily laid-off and thus eligible to vote.

> Whether to set aside an election because of incidents during the campaign period is a matter for the sound discretion of the Board. As has been frequently remarked: * * * 'Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.' *N.L.R.B.* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226 . . . ; *N.L.R.B.* v. *A. J. Tower Co.*, 329 U.S. 324, 330 . . . .

Accord: *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482; *Foreman & Clark, Inc.* v. *N.L.R.B.*, 215 F. 2d 396, 409 (C.A. 9), cert. denied, 348 U.S. 887; *Department & Specialty Store Emp. Union, Local 1265, RCIA* v. *Brown*, 284 F. 2d 619, 627 (C.A. 9), cert. denied, 366 U.S. 934. The only question for the courts is whether the Board reasonably exercised its discretion. *N.L.R.B.* v. *J. R. Simplot Company*, 322 F. 2d 170, 172 (C.A. 9); *International Tel. & Tel.* v. *N.L.R.B.*, 294 F. 2d 393, 395 (C.A. 9); *Neuhoff Brothers Packers, Inc.* v. *N.L.R.B.*, 362 F. 2d 611, 614 (C.A. 5), cert. denied, 386 U.S. 956; *Olson Rug Company* v. *N.L.R.B.*, 260 F. 2d 255, 256 (C.A. 7). As the Court further noted in *Rockwell, supra* at 797:

> The Board has always considered it a question of degree whether the conduct revealed by the record is so glaring as to impair the employees' freedom of choice, necessitating a new election. *General Shoe Corp.*, (1948) 77 NLRB 124, 126.
>
> Each incident must be considered in the light of the precise circumstances of a particular case,

> having reference to the timing, proportion of employees affected, and the character of the threat.

The burden, moreover, is on the party urging that an election be voided to overcome the "strong presumption that the ballots cast in secrecy under the safeguards regularly provided by [Board] procedures, reflect the true desires of the participating employees." *Maywood Hosiery Mills, Inc.*, 64 NLRB 146, 150. See *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *N.L.R.B.* v. *National Survey, Inc.*, 361 F. 2d 199, 207-208 (C.A. 7); *N.L.R.B.* v. *Zelrich Co.*, 344 F. 2d 1011, 1015 (C.A. 5); *Liberal Market, Inc.*, 108 NLRB 1481, 1482. We demonstrate below that the Employers have not shown that the "impair[ment of] the employees' freedom of choice" here was "so glaring" as to warrant the conclusion that the Board abused its discretion in refusing to set aside the election.[31]

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[31] In response to the Employers' contention before the Board that their objections raised substantial and material issues of fact which warranted a hearing, the Board, in its Decision and Order, declared (R. 325):

> In determining upon the requests for review whether the Employers' objections raised substantial and material issues of fact, the Board in accordance with its usual practice viewed the evidence in a light most favorable to the Employer-objectors and did not rely on any "credibility resolutions." Thus, the Board assumed the accuracy of the allegations of objectionable conduct as reported by the Employers' witnesses, and concluded that this conduct, if it happened as alleged, would be insufficient to warrant setting aside the election. Accordingly, the Board decided that a hearing was not necessary and that

B. *The Board properly overruled the Employers' objections based on the alleged threats of economic and other reprisals*

As shown in the Counterstatement, the first two of the Employers' six objections alleged that the Union's pre-election campaign was marked by threats which created an atmosphere of fear sufficient to impair the fairness of the election. In the first of these two objections, the Employers alleged that the Union interfered with the conduct of the election by threatening K-Mart's employees with loss of employment if they did not join or support the Union (*supra* pp. 13-14). In support of this objection, the Employer relied on two alleged incidents. In the first, a Union representative told an employee "If you don't join and the Union is voted in, you will lose your job" (*supra* p. 14). A reasonable interpretation of this statement was, as indicated by the Regional Director's investigation,[32] merely an over-simplified prediction of what would happen *if* the Union were voted in, and *if* it succeeded in its bargaining for a union-security clause in its contract. Thus, the statement related

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the objections were properly overruled. We here reaffirm the aforesaid ruling.

In light of the Board's declaration, the Employers concede that the question of whether or not a hearing on objections should have been granted is not before this Court (K-Mart Br. 65).

[32] As shown in the Counterstatement, *supra*, p. 14, the Union's representative told employees that the Union's contracts contained union security clauses requiring membership in the Union after thirty days' employment, as a condition of employment.

only to union membership and was not conditioned upon whether the employee voted for the Union or not. Moreover, such disclosure by a union before an election, far from confusing or coercing an employee into voting for the union, would tend to encourage him to vote against the union. Thus, the Board properly rejected this incident as basis for sustaining the Employers' first objection. *A.R.F. Products, Inc.*, 118 NLRB 1456, 1458-1459; *Otis Elevator Company*, 114 NLRB 1490, 1493.

In the second incident, a K-Mart employee reported a telephone conversation on March 16 with an unidentified person, who stated that he was a "union representative" and warned her that the Union was going to "get in" and that if she did not vote for it, she would not have her job long. Aside from the caller's ambiguous assertion that he was a "union representative", there is no evidence that this remark was attributable to the Union. Nor is there evidence that this threat was communicated to other employees. Under the circumstances, the Regional Director was warranted in concluding that this remark was insufficient to create an atmosphere of fear and reprisal. *Orleans Mfg. Co.*, 120 NLRB 630, 633-634; *Allied Plywood Corp.*, 122 NLRB 959, 961; *Pittsfield Shoe Corp., Inc.*, 119 NLRB 1067, 1068; *A.R.F. Products, Inc., supra* at 1458; *Macomb Pottery Company* v. *N.L.R.B.*, 376 F. 2d 450, 454 (C.A. 7); *Shoreline Enterprises* v. *N.L.R.B.*, 262 F. 2d 933, 942 (C.A. 5); *N.L.R.B.* v. *MYCA Products*, 352 F. 2d 511, 512 (C.A. 6); *Rockwell Mfg. Co., Kearney Div.* v. *N.L.R.B., supra* at 797; *Manning, Maxwell, & Moore,*

Inc. v. *N.L.R.B.*, 324 F. 2d 857, 858 (C.A. 5). Further, assuming the Union were responsible for the telephoned threat, the statement did not impair the employee's free choice. For the Board could reasonably credit the employee with the good sense to recognize that the predicted economic reprisal could not be effectuated without K-Mart's acquiescence and cooperation.[33] *Otis Elevation Company*, 114 NLRB 1490, 1493; *Bender Playground Equipment, Inc.*, 97 NLRB 1561, 1562; *Rio De Oro Uranium Mines, Inc.*, 120 NLRB 91, 94; *Kresge-Newark, Inc.*, 112 NLRB 869, 871. Certainly, the anti-union pre-election speech of March 31, 1965, delivered by K-Mart to its employees, including a statement that voting would be by secret ballot (R. 157; 168) was sufficient to dispel any fear that the threat could be carried out. *Shoreline Enterprises* v. *N.L.R.B.*, *supra*, at 942; *Bender Playground Equipment, Inc.*, *supra; General Electric Co.* v. *N.L.R.B.*, 66 LRRM 2262, 2264, 56 L.C. para. 12198 (C.A. 4, Sept. 20, 1967).

The Employers' second objection alleges that the Union impaired the election by threatening employees with physical violence and other reprisals (*supra*, at p. 14), and by subjecting employees to surveillance. The Employers sought to support this objection by evidence that the Union had threatened and coerced

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[33] Far from being intimidated, the employee told the caller "that he seemed pretty sure of himself" and then ended the discussion by telling him that her father was waiting for her and she "could not talk any longer" (R. 241).

employee Leo Hosey (R. 242-249).[34] Such evidence consisted of testimony that Hosey had told his supervisors that he had been threatened, and the testimony of Michael Castanon, a fellow employee, that he overheard the threat (R. 242-246). According to Castanon, after Hosey refused to accept literature from a Union representative and admonished him to stop visiting his home, the representative replied, "You we don't want. You'd better hope the Union doesn't get in." In contrast, Hosey, in his affidavit, denied that he had been threatened, and reported that a union representative had visited his home once, prior to the alleged threat, and on a second occasion, on the day before the election (R. 158). However, assuming the accuracy of Castanon's version, the Union representative's statement would appear to constitute an inducement to vote *against* the Union, not for it.

As noted *supra*, pp. 47-48, threats which create a general atmosphere of fear and reprisal, rendering a free election impossible, warrant setting aside an election whether or not the misconduct is attributable to the parties in whole or in part. See *N.L.R.B.* v. *Trancoa Chemical Corp.*, 303 F. 2d 456, 461 (C.A. 1); *Diamond State Poultry Co.*, 107 NLRB 3, 6. The Board properly refused to find that the evidence of the reported threats in the instant case added up to create such a "general atmosphere." For, as we have shown, the impact of each of the three alleged re-

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[34] As shown in the Regional Director's Supplemental Decision, there was no evidence of surveillance by the Union (R. 158).

marks was limited to one employee in the unit of 80 voters, and a fourth employee, Castanon, who overheard one of them. Finally, it is difficult to conceive that such antagonizing conduct would have induced any of the four employees involved to vote for the Union. Under these circumstances, the Board was not required to set aside the election. *Macomb Pottery Company* v. *N.L.R.B.*, *supra*, 376 F. 2d at 454. See *Rockwell Mfg. Co., Kearney Div.* v. *N.L.R.B.*, *supra*, 330 F. 2d at 797; *Shoreline Enterprises* v. *N.L.R.B.*, *supra*, 262 F. 2d at 942. Compare *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F. 2d 241, 243-244 (C.A. 5).

C. *The Board properly overruled the Employers' objections based upon the Union's pre-election propaganda*

1. *The alleged misrepresentations*

The Employers contend in their objections 3, 4 and 6 (*supra* pp. 15-19), that the Union made various misrepresentations which impaired the employees' freedom of choice in the election. As we now show, the Board's rejection of these contentions was clearly a proper exercise of its wide discretion.

The Board's rules regarding campaign misrepresentations distinguish between "a substantial departure from the truth . . . [which] may reasonably be expected to have a significant impact on the election" and, on the other hand, those "ambiguities, like extravagant promises, derogatory statements about the other party, and minor distortions of some facts [which] frequently occur in communications between

persons." *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, 224. With respect to the latter, the Board's policy is to trust the common sense of the electorate to evaluate and fairly discount such utterances. Indeed, the American voter's exposure to the hyperbole and inaccuracies which characterize our political campaigns has surely imbued the electorate with a healthy skepticism of all campaign propaganda. As the Seventh Circuit has pointed out, "Prattle rather than precision is the dominating characteristic of election publicity." *Olson Rug Co.* v. *N.L.R.B.*, 260 F. 2d 255, 257.

Where campaign statements are grossly inaccurate or where the facts regarding matters of considerable significance in the campaign are distorted, and under the surrounding circumstances are likely to have substantial impact on an election, the Board will, of course, intervene to protect the integrity of its processes.[35] Thus, in evaluating the probable impact of a misstatement upon the election, the Board's considerations include whether "the party making the statement possesses intimate knowledge of the subject matter so that the employees sought to be persuaded may be expected to attach added significance to its assertion" and whether "the employees pos-

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[35] For cases where elections have been set aside by the Board for substantial campaign misrepresentations by either an employer or a union, see *Coca-Cola Bottling Company of Louisville*, 150 NLRB 397, 399-400; *Grede Foundries, Inc.*, 153 NLRB 984; *Hollywood Ceramics, supra; Steel Equipment Co.*, 140 NLRB 1158; *U.S. Gypsum Co.*, 130 NLRB 901; *Cleveland Trencher Co.*, 130 NLRB 600, 602-603.

sessed independent knowledge with which to evaluate the statements." *Hollywood Ceramics Company, Inc.*, *supra*, at 244. On the basis of these standards, the Board was warranted in finding that the Union's propaganda did not deprive the employees of a free choice in the election.

First, the Employers objected to the Union's leaflet, issued to employees on April 5 or 6, which compares wage rates in various job categories between K-Mart and similar stores under union contract (*supra*, p. 16). The Employers contended that the leaflet was false and misleading because it failed to state that the union rates were received by employees only after one year's employment, and further, because some K-Mart employees received more than the $1.80 which it depicted as K-Mart's hourly rate. However, as noted by the Regional Director and the Board, on March 26, the Union had mailed a leaflet to employees which reported the same union rates and the same classifications as were depicted in the later leaflet, and plainly stated that such rates applied only after "1 year of service" (R. 288; 159). Further, Food Giant and White Front each operated a store, under contract with the union, in the same Commerce shopping center where K-Mart was located (R. 288, 159).

In these circumstances, we submit that the Union's April leaflet did not contain any misstatement likely to have had any substantial impact upon the election. As the Regional Director noted, K-Mart's wage rates were not within the Union's special knowledge, but, rather, were matters about which K-Mart employees had independent knowledge. Further, as the Board

observed, the employees had previously been informed of the existence of a one-year experience qualification on union rates in the area, and could have resolved any doubt fostered by the April leaflet by inquiry of employees at nearby unionized stores. Thus, under its policy as stated in *Hollywood Ceramics* (*supra* at 244), the Board properly refused to invalidate the election in the face of inaccuracies which the employees could have readily evaluated. Accord: *Russell-Newman Manufacturing Co., Inc.*, 158 NLRB 1260, 1261-1265, enf'd, F. 2d (C.A. D.C.) (Nos. 20,217 and 20,415, decided April 12, 1967); *Anchor Manufacturing Company* v. *N.L.R.B.*, 300 F. 2d 301, 303-304 (C.A. 5); *General Electric Co.* v. *N.L.R.B.*, *supra*, 66 LRRM at 2264; *N.L.R.B.* v. *Allen Manufacturing Company*, 364 F. 2d 814, 816 (C.A. 6).

With respect to the inaccuracy found by the Board in the Union's leaflet, K-Mart and Hollywood Hat Co. contend that the instant case is governed by the Board's decisions setting aside elections in *Hollywood Ceramics*, *supra*; *Ore-Ida Foods, Inc.*, 160 NLRB No. 102; *The Cleveland Trencher Company*, *supra*; and Courts of Appeals' decisions nullifying Board-conducted elections in *United States Rubber Company* v. *N.L.R.B.*, 373 F. 2d 602 (C.A. 5); and *Graphic Arts Finishing Co., Inc.* v. *N.L.R.B.*, 380 F. 2d 893 (C.A. 4) (K-Mart Br. 68-69, Hollywood Br. 13). We submit that the Board's reasonable conclusion that the Union's leaflet was free of substantial misstatements distinguishes the instant case from the Board cases upon which K-Mart and Hollywood Hat rely. For

in those cases, the Board found substantial misrepresentations which by their content, and the setting in which they were uttered, impaired the employees' free choice. To similar effect is *United States Rubber*, *supra*, where the Fifth Circuit, contrary to the Board, held, *inter alia*, that a union's assertion in pre-election propaganda that the employees were doing six days' work in "only five and getting paid for only five", if false, would be a substantial mistatement sufficient to impair the employees' free choice (373 F. 2d at 605). Similarly, in *Graphic Arts*, *supra*, the Fourth Circuit, in disagreement with the Board, held that a preelection union circular which exaggerated wages and fringe benefits, and another which misrepresented strike benefits paid by the union during a strike against another employer and falsely asserted that no striker had "lost a thing" by reason of the strike, "prevented the employees from registering their free and untrammeled choice as to a bargaining representative" (380 F. 2d at 896). Thus, to argue, as do K-Mart and Hollywood Hat, that the facts of this case fit squarely into the fact patterns found in other cases ignores substantial differences in the statements made by the unions and the context in which the statements were made. The question in this case, as in each case involving election campaign propaganda, is one of degree, dependent upon the precise circumstances found. For that reason, no case in which an election was or was not set aside is likely to be squarely in point. However, as we have shown, in the instant case the Board has properly applied its settled policy, approved by the courts, not to set aside

an election because of campaign misrepresentations unless it finds it likely that such utterances had a significant impact on the election. *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60-61; *Olson Rug Co.* v. *N.L.R.B.*, 260 F. 2d 255, 257 (C.A. 7); *Anchor Mfg. Co.* v. *N.L.R.B.*, 300 F. 2d 301, 303 (C.A. 5); *Hollywood Ceramics Company, Inc., supra*, 140 NLRB at 224; cf. *Follett Corp.*, 160 NLRB No. 37.

The Employers' fourth objection alleged that the Union's pre-election letter to employees falsely declared that they would "not be required to pay double dues as some of the members have voluntarily voted to do" (*supra* pp. 17-18). To support their allegation, the Employers relied wholly upon a news article published in the Union's newspaper in March 1965, which merely reported that members of its Food, Drug and General Sales Division had voted to pay double dues to support a strike fund (R. 174). However, as the Regional Director noted, there was "nothing in the letter which [was] contrary to the article . . ." (R. 160). Both the letter and the newspaper article agreed that a portion of the Union's membership had voted to pay double dues. However, there was nothing in the article to refute the Union's assertion that K-Mart store employees as new Union members would not be required to pay double dues. The burden of proving the falsity of the Union's assertion rested upon the Employers. *N.L.R.B.* v. *Mattison Machine Works*, 365 U.S. 123, 124; *Anchor Manufacturing Company* v. *N.L.R.B.*, *supra*, 300 F. 2d at 303. Aside from the newspaper article, the Employers did not provide any evidence to support the allegation. We

submit, therefore, that the Regional Director properly overruled this objection.

In their sixth objection, the Employers alleged that on April 7, the day of the election "but prior to the time the polls opened, the Union . . . made false and misleading statements on material matters to one or more employees at the K-Mart location" (R. 161; 113-114). To support this allegation, the Employers furnished the statement of employee Carol Platteborze concerning a two-hour question-and-answer exchange between herself and two Union representatives on the morning of the election, which was held on her day off. According to Platteborze, that morning she received a telephone call from a Union representative who asked whether she intended to vote in the election that day and offered transportation for that purpose. Platteborze seized on this call as an opportunity to obtain answers to some questions she had rehearsed earlier with the K-Mart Assistant Store Manager Robinson, who had expressed interest in obtaining such answers from Union sources. Accordingly, at the end of the two-hour exchange, Platteborze recorded her recollection of her questions and the Union's answers, and gave this abstract to the interested assistant store manager later in the afternoon. There is no evidence that Platteborze related that morning's conversation to any employee. In these circumstances, any misrepresentations which the Union representatives may have made concerning the Union's strike record, the reinstatement rights of economic strikers, or any other matter could not have

had any effect upon the election. Platteborze questioned the Union's representatives, not as an employee whose decision to vote for or against the Union turned upon persuasive answers, but, rather, as one acting as a listening post for management. Thus aligned with management on the very morning of the election, it is unlikely that Platteborze would have been persuaded to change her position by any of the alleged misrepresentations attributed to the Union's representatives who called her at that juncture. Further, there is no evidence that any of the alleged misrepresentations received further publication before or after Platteborze furnished her report to Assistant Manager Robinson. In these circumstances, even if the Union made the alleged misrepresentations to Platteborze, they could have had no impact upon the election. Accordingly, the Board properly overruled this objection. *Hollywood Ceramics Company, Inc.*, *supra* at 224.

2. *The waiver of initiation fees*

As set forth above, p. 18, the Union told the employees that:

> It has always been the policy of our Organization that we do not charge initiation fees of any kind to any newly organized members. This policy will apply to any K-Mart employee who becomes a member of our Union as the result of our winning the election at your store and who is employed there at the time the employees sign their first Union contract.

The Board correctly concluded that this statement did not improperly influence the employees' votes.

The Board's conclusion in the instant case finds strong support in *Macomb Pottery Company* v. *N.L.R.B.*, *supra*, where the Union's pre-election propaganda included the following statement:

> The initiation fee is waved [sic] because all employees working . . . when the contract is signed will be charter members. No initiation fee for charter members.

Rejecting the company's contention that the union's promise of waiver invalidated the election, the Seventh Circuit held that "any persuasive effect the promised waiver may have on an individual employee in these circumstances is no different in kind from a statement of the amount of the dues or other representations of the advantages and burdens of membership." 376 F. 2d at 455. Similarly, the Second Circuit in *N.L.R.B.* v. *Edro Corp.*, 345 F. 2d 264, 268, found no impropriety in an exemption of all who join before a contract is signed, and declared:

> * * * This statement gave adequate notice to all employees, whether they approved or disapproved of the union, that they had nothing to lose by waiting for the union to achieve recognition before applying for membership.

Accord: *N.L.R.B.* v. *Gorbea, Perez & Morell, S. en Co.*, 328 F. 2d 679, 682 (C.A. 1); *N.L.R.B.* v. *Taitel*, 261 F. 2d 1, 4 (C.A. 7), cert. denied, 359 U.S. 944. Thus, the Board's conclusion in the instant case finds ample approval in judicial precedent.

N.L.R.B. v. *Gilmore Industries, Inc.*, 341 F. 2d 240 (C.A. 6) is distinguishable from the instant case.

The court there found that the union misled employees into believing "that the waiver of initiation fees amounted to a benefit of three hundred dollars if the union won the election" instead of "tell[ing] the truth, namely, that its initiation fee was six dollars and not three hundred dollars." *Id.* at 242. Here, the Union did not misrepresent the value of the waiver. To the extent that *Gilmore* may question every waiver like the one at bar, where an employee may refuse to join the union before an election and still benefit by the waiver if the union wins, we submit that *Gilmore* is inconsistent with the decisions of the First, Second, and Seventh Circuits, cited above. Indeed, the First Circuit expressly approved the Board's decision in *Gilmore*. *N.L.R.B.* v. *Gorbea, Perez & Morell, S. en C.*, *supra* at 682.

Further, as the Regional Director noted, *Lobue Bros.*, 109 NLRB 1182, is distinguishable from this case. There, the union solicited employee signatures on cards entitling the signer "to a membership book free of initiation fee 'after election and certification . . .' hence conditioned upon petitioner's winning the elections." Employees who signed cards before the election were in fact given membership books containing the waiver. The Board concluded that, in these circumstances, the employees would be likely to regard the waiver as the *quid pro quo* for their votes, and hence, set the election aside. In the instant case, unlike *Lobue*, the waiver was not conditioned upon how the employee voted in the election, but was available to anyone employed at the time the Union en-

tered into a collective-bargaining agreement with the Employers.

In any event, the Board recently reexamined the principles underlying its *Lobue* decision and overruled that case, in *Dit-MCO, Incorporated*, 163 NLRB No. 147 (decided April 12, 1967). The Board concluded that "waivers, or provisional waivers, of union initiation fees, whether contingent upon the results of an election or not have no improper effect on the freedom of choice of the electorate, and do not constitute a basis for setting aside an election." *Id.* at 7. In formulating its conclusion, the Board made the following observations, which are particularly applicable to the instant case (*Id.* at pp. 5-6):

> . . . employees who have received or been promised free memberships will not be required to pay an initiation fee, *whatever the outcome of the vote.* If the Union wins the election, there is by postulate no obligation; and if the union loses, there is *still no obligation*, because compulsion to pay an initiation fee arises under the Act only when a union becomes the employees' representative and negotiates a valid union-security agreement. Thus, whatever kindly feeling toward the union may be generated by the cost-reduction offer, when consideration is given only to the question of initiation fees, it is completely illogical to characterize as improper inducement or coercion to vote "Yes" a waiver of something that can be avoided simply by voting "No." (Emphasis in original.)

IV. The Board Properly Found That the Employers' Refusal to Bargain With the Union Violated Section 8(a)(5) and (1) of the Act

As we have shown, *supra* pp. 23, 32-63, on September 9, 1965, the Board properly certified the Union as the collective bargaining representative of a store-wide unit of selling, nonselling, and office clerical employees at K-Mart's Commerce store. Thereafter, on September 21, and again, on October 19, 1965, the Union requested K-Mart to meet with it for the purpose of collective bargaining (*supra* pp. 23-24). K-Mart refused both requests. Gallenkamp, Mercury, Acme, F & G and Hollywood also refused the Union's requests that they meet with it for contract negotiations. We submit that the Board properly found that by such refusals to bargain, the Employers violated Section 8(a)(5) and (1) of the Act.

Aside from its contentions regarding the appropriateness of the unit and the validity of the election, Hollywood Hat Co. seeks to justify the Employers' refusal to bargain on the grounds that the certification, the Union's demand for bargaining, the amended charge and the complaint were defective (Hollywood Br. 3-13). More particularly, Hollywood contends that the certification was invalidated by the inclusion of Besco and the exclusion of Zale, allegedly an indispensable party; and that the Union's demand for recognition and bargaining, the amended charge, and the complaint were defective because they named Besco as a joint employer, although Besco had ceased doing business at the Commerce store. Hollywood also contends that the Union's demand for recognition and

bargaining was defective as it did not demand that K-Mart and its licensees bargain jointly. We submit that the Board properly rejected these contentions.

As shown in the Counterstatement, *supra* p. 24, Besco ceased its business activity at the Commerce store eight days prior to the April 7, 1965 election. Further, at some time between the election and the Board's certification on September 9, 1965, Zale began operations at the Commerce store. However, the Board had received no formal word of these changes at the time it issued its certification (R. 325; C. Tr. 23, 30-33).[36] Further, the Union was not apprised of

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[36] Compare *K-Mart, A Division of S.S. Kresge, et al.*, 163 NLRB No. 88 (relied on by Hollywood, br. pp. 8-9). In that case, which involved the K-Mart store at San Fernando, California, the Board had directed an election (159 NLRB No. 28) finding that K-Mart, Gallenkamp and Mercury were joint employers of the employees in the licensed departments, and describing the unit as "employees of K-Mart, Mercury, and Gallenkamp." However (unlike the instant case), before the election was held, the Board was administratively advised that a new licensee, Holly Stores, Inc., had commenced operations at the store sometime after the Board's decision issued. Accordingly, the Board issued an order noting the existence of Holly at the store and amending its unit description to read, generally, "employees of K-Mart and those of its licensees," without specifically naming the licensees. Thereafter, still before the election, Holly filed an objection to its implicit inclusion in the unit without notice and a hearing. After the election, in which (unlike the instant case) Holly's employees voted by challenged ballot, and after the issuance of a show-cause order by the Board requesting that Holly come forward with facts distinguishing its relationship with K-Mart from that of the other licensees, the Board, upon Holly's reiteration of its earlier objection, issued an order remanding the case for a hearing on the issue raised by

Besco's absence from the Commerce store until it received Besco's letter of October 22, 1965, which revealed that fact (R. 325; G.C.X. 46(b)). Nor did the Union learn of Zale's presence until sometime after receipt of Besco's letter (R. 325; 291-292, 294).

Beyond question, the facts as to Besco's removal from the Commerce store, and Zale's arrival, were immediately known by the Employers during the representation proceedings (R. 325; R. Tr. 23, 30-33). However, they chose to remain silent as to these matters until the unfair labor practice proceeding (R. 325; R. Tr. 31). Neither K-Mart nor its licensees advised the Board of Besco's absence or of Zale's presence prior to the certification. Nor did they ever request the Board to clarify its certification, as provided under the Board's Rules and Regulations, Sec. 120.60(b) (29 C.F.R. 102.60(b).[37] Also, unlike the circumstances in *K-Mart San Fernando supra*, n. 36, no employees of Zale or of Besco voted or cast a challenged ballot in the election (R. 326). Again, at the unfair labor practice hearing, the Employers failed to

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Holly's objection. Upon the evidence adduced at the hearing, the Board issued a supplemental decision and direction in which it found that K-Mart was a joint employer of Holly's employees at the San Fernando store, included Holly's employees in the unit theretofore found appropriate, and directed the opening and counting of the ballots.

[37] This section of the Board's Rules and Regulations provides:

> A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer.

seek clarification of the unit, or to introduce any evidence that Zale is a joint employer of its employees with K-Mart, or that it should properly be included in the certified unit. Thus, the Employers failed to provide any support for their allegation that Zale is an "indispensable party". In any event, as the Board declared, "That Zale commenced operations before the certification is of no moment, as the certification established the majority status of the Union at the time of the election" (R. 326). Accord: *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96, 98-100; *N.L.R.B.* v. *Yutana Barge Lines Inc.*, 315 F. 2d 524, 527-528 (C.A. 9).

Finally, although the charge and complaint named Besco as a respondent, the Employers have no basis for complaint. For, this slight error was corrected at the unfair labor practice hearing, when counsel for the General Counsel declared that no bargaining order was sought against Besco (C. Tr. 23-24). Moreover, the Board's bargaining order herein is not directed to either Besco or Zale (R. 326-328).[38]

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[38] *N.L.R.B.* v. *Schnell Tool & Die Corporation*, 359 F. 2d 39 (C.A. 6), does not support Hollywood's contention that a determination of Zale's status is a necessary condition to the enforcement of the Board's bargaining order in the instant case (Hollywood Br. 7-8). For, in that case, after the entry of the Board's order, the named respondents ceased operations and sold their plants. The Court refused to enforce the order against the named respondents until after the Board determined through its own proceedings whether the purchaser constituted a "functioning employer against whom such a decree could in fact be enforced" (359 F. 2d at 44). In the instant case, all of the respondents named in the Board's order are functioning and well able to comply with its directions.

Hollywood's contention (Hollywood Br. 10-13) that the Union's demands for bargaining were fatally defective does not find support in the record. Thus, the Union's letter of September 21, 1965, to K-Mart, and its letters of October 18, 1965, to each of the licensees specifically mentioned the certification issued by the Board, stated that the certification was for "the employees in the K-Mart Store", and then requested "discussions" leading to a collective-bargaining agreement (R. 327; G.C.X. 41(a), 42(a), 43(a), 44(a), 45(a), 46(a), 47(a)). Each of the licensees except Besco, replied only that it was not "obligated" to comply with the Union's request (R. 327; G.C.X. 41(b), 42(b), 43(b), 44(b), 45(b), 47(b)). In its reply of September 29, 1965, rejecting the Union's request, K-Mart stated, *inter alia*, "that the unit of employees for which your Union seeks to act as the collective bargaining representative at our Commerce store is inappropriate" (R. 327; G.C.X. 41(b)). On October 19, 1965, the Union renewed its demand for bargaining by a letter which declared (R. 327; G.C.X. 48):

> So that there is no misunderstanding about the request made by the Union, this is to confirm the fact that the Union's request to bargain was a request upon your client to bargain in the *unit found appropriate by the Board.* (Emphasis in original.)

A review of the Union's bargaining requests shows nothing to support Hollywood's contention that the Union was seeking to abandon the certified unit and bargain on a single-employer basis. On the contrary,

as the Board properly observed, the Union's demand letters "could only be interpreted as a request for bargaining on a joint employer basis" (R. 327).

Clearly, it was not necessary that the Union's bargaining request conform to any specific form or be made in any specific words. *N.L.R.B.* v. *Albuquerque Phoenix Express*, 368 F. 2d 451, 453 (C.A. 10); *N.L.R.B.* v. *Barney's Supercenter, Inc.*, 296 F. 2d 91, 93 (C.A. 3); *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 185 F. 2d 732, 741 (C.A.D.C.), cert. denied 341 U.S. 914. Further, where as here, the record establishes beyond doubt that the Employers understood that a bargaining demand was being made by the certified representative of an appropriate unit of their employees, they were not at liberty to rely upon the Union's use of separate demand letters, and some apparent ambiguities in language taken out of context, as excuses for an absolute refusal to bargain. *Sakrete of Northern California, Inc.* v. *N.L.R.B.*, 332 F. 2d 902, 908 (C.A. 9), cert. denied, 379 U.S. 961; *N.L.R.B.* v. *Scott & Scott*, 245 F. 2d 926, 927-928 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a decree should issue denying the petitions to review and enforcing the Board's order in full.[39]

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MARCEL MALLET-PREVOST,
Assistant General Counsel,

NANCY M. SHERMAN,
LEONARD M. WAGMAN,
Attorneys,

National Labor Relations Board.

November 1967.

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[39] In requiring the Employers to bargain with the Union, the Board was well within its broad discretionary power to formulate an appropriate remedy. *Franks Bros. Company* v. *N.L.R.B.*, 321 U.S. 702, 704-706; *N.L.R.B.* v. *Carlton Wood Products*, 201 F. 2d 863, 867 (C.A. 9). It has long been recognized by the courts that the Board's orders must stand unless "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 216. Accord: *N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 346. Where, as here, an unlawful refusal to bargain has been found, the Board's bargaining order provides a remedy which the courts have long accepted as clearly consistent with the policies of the Act and within the Board's discretion. *International Ladies' Garment Workers* v. *N.L.R.B.*, 366 U.S. 731, 740; *N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 432; *N.L.R.B.* v. *Carlton Wood Products, supra; Northern Virginia Steel Corporation* v. *N.L.R.B.*, 300 F. 2d 168, 175 (C.A. 4); *San Antonio Machine & Supply Corporation* v. *N.L.R.B.*, 363 F. 2d 633, 642-643 (C.A. 5).

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).
>
> * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other

terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . .

REPRESENTATIVES AND ELECTIONS

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employes in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hear-

ing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act: * * *

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filings of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. . . . Upon the filing of the record with

it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

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No. 21,649

HOLLYWOOD HAT CO.,

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vs.

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Respondent.

On Petition to Set Aside an Order of the National Labor Relations Board.

Reply Brief of Petitioner K-Mart, a Division of S. S. Kresge Co.

CLARK, KLEIN, WINTER, PARSONS & PREWITT,
JOHN DONNELLY,
1600 First Federal Building,
1001 Woodward Avenue,
Detroit, Michigan 48226,
Attorneys for Petitioner K-Mart, a Division of S. S. Kresge Co.

Of Counsel:
HILL, FARRER & BURRILL,
STANLEY E. TOBIN,
411 West Fifth Street,
Los Angeles, Calif. 90013.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

Miscellaneous

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I.

THE APPROPRIATE UNIT QUESTION.

In his Brief, the General Counsel makes only one argument on the unit question; namely, that the Board is granted great discretion in determining the appropriate unit and that here there was a reasonable exercise of that discretion.[1] But his argument is supported by a soft-pedalling of the Record and wholly fails to come to grips with the real issues. This Court has thereby been deprived of a thorough discussion of matters that should be faced squarely in reviewing the Board's order.

The General Counsel, as did the Board in its Decision below, ignores much of the Record including the Transcript of the Testimony. Equally ignored is Board and Court precedent which control this case and which, he concedes, is still in effect; it is dismissed for the most part in footnotes.

We would like to discuss the General Counsel's argument in some detail. At page 34 of his Brief, the General Counsel begins his argument by reciting the various *retailing relationships* between K-Mart and its Licensees. How these show that K-Mart controls the *labor relations* of its Licensees is not demonstrated.

Then the General Counsel refers to the License Agreement and the Rules and Regulations issued by K-Mart. His manner of arguing from these Regulations is cursory as may be illustrated from these examples:

(a) On page 35 he states: "These rules include provisions relating to hirings and terminations. . . ." He neglects to state that, at page 3 of the Rules, hirings and terminations are *specifically* left to the Licensee.

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[1]References to the Board's answering brief are preceded by the designation, "Resp. Br." and to the page number therein.

(b) On page 35: "Licensees are required to operate their departments with 'sufficient help' during hours established by K-Mart, which has thus substantially limited the Licensees' power to vary or curtail its employees' working hours." Nonsense! The provision merely refers to the hours the Licensee must have his counters open —he may set any hours for any number of employees he wishes and in fact the Licensees do so as testified to at the hearing [Vol. III, G.C. Ex. 2(a), Vol. II-A, p. 47; pp. 54-55].

(c) On page 36: "Finally, Licensees are directed to 'Not permit the continuance of a labor dispute involving its department which materially affects the sales or threatens the operations of other Licensees or Licensor.'" This is supposed to prove beyond argument that K-Mart dominates the labor relations of its Licensees. But conveniently omitted is the Board's language in *Bab-Rand Co.*, 147 NLRB 247 (1964) [a case which we infer from the General Counsel's footnote 22 is still good law] which used similar language as an argument to prove the opposite conclusion; *i.e.*, that there was *no* joint employer relationship (The language is quoted at pp. 31-32 of the Opening Brief).

(d) At page 36, it is asserted that the K-Mart License Agreement gives K-Mart control over the Commerce store "specifically including labor relations" of its Licensees. This is not true. Such control is neither specifically nor impliedly provided for by the Agreement.

Equally cavalier is the General Counsel's treatment, in his footnote 20, pp. 36-37, of the alleged "authority" of K-Mart over what are described as mandatory subjects of collective bargaining. Illustrations are:

(a) Because the Rules and Regulations imply that the Licensees are to "provide sufficient help" the General Counsel states that "K-Mart may prescribe the number of employees it deems necessary to operate a Licensee's department." And from this he concludes that this provision gives K-Mart control of its licensees' "employee work loads", citing *NLRB v. Bonham Cotton Mills, Inc.*, 289 F. 2d 903, 904 (5th Cir. 1961). The *Bonham Cotton* case involved an employer who "made substantial changes in the workloads of some employees." The Record shows K-Mart has no power to determine the work load or hours of any Licensee employee [Vol. II-A, pp. 47; 54-58].

(b) The General Counsel notes that under the Rules and Regulations neither K-Mart nor its Licensees will hire an employee or former employee of the other. The General Counsel calls this provision "hiring practice and tenure of employment". Obviously this is aimed at "raiding" and at hiring of people already found undesirable and has nothing to do with control of general hiring of employees or of their tenure of employment.

(c) The General Counsel asserts that "company rules concerning coffee breaks, lunch periods, smoking, employee discipline, and dress are mandatory bargaining subjects" and that the K-Mart Rules and Regulations contain provisions governing them. There is nothing in the Rules about "coffee breaks or lunch periods" and the smoking, discipline and dress provisions are so innocuous as to render absurd any serious attempt to argue that they have the effect of making K-Mart a joint employer. They are merely rules relating to customer-relations and safety requirements.

(d) Finally, the General Counsel states that the K-Mart Rules and Regulations contain provisions governing "similar working conditions". He fails to enumerate such "similar" conditions.

After making the foregoing unsupportable arguments the General Counsel concludes that K-Mart's termination power contributes to the Board's joint employer finding (Resp. Br. p. 37). This suggests that joint organization of the Commerce Store will, hopefully in the Board's eyes, destroy K-Mart's contractual right to terminate a License Agreement which has been breached by a Licensee. Certainly the termination power given K-Mart does not have a thing to do with labor relations. Were the clause not contained in the License Agreement it would be implied as a matter of general contract law.

Avoided by the General Counsel are the yardsticks used for years by the Board (and approved by the courts) in making joint employer findings. Not a word is said about the Board rule that this finding is "determined by which of the two [Licensee or Licensor] has the primary right of control over matters fundamental to the employment relationship." *Duanes Miami Corporation,* 119 NLRB 1331, 1334 (1958). Nor does the General Counsel comment on the Board's oft quoted language that: "The decisive elements in establishing an employer-employee relationship are complete control over the hiring, discharge, discipline and promotion of employees, rates of pay, supervision and determination of policy matters." *Roane-Anderson Co.,* 95 NLRB 1501, 1503 (1951).

In light of these Board precedents how could the General Counsel overlook the fact that the License Agreement specifically provides that the Licensees are to retain charge of their own hirings and firings [Vol.

III, G.C. Ex. 2(c) Employer's Ex. 1, p. 1]; that the Rules and Regulations have a specific section on page 1 entitled "Discipline" which does not give K-Mart the power to discipline employees of Licensees [Vol. III, G.C. Ex. 2(c), Employer's Ex. 2, p. 1]; and the clear, concise, and absolutely uncontradicted testimony of Mr. Sanger, quoted beginning at page 32 of the Opening Brief, showing that none of the elements of joint control are present? And how was the General Counsel able to eschew any reference to the second paragraph of Paragraph 22 of the License Agreement which states that: "[t]he parties do not intend this Agreement to constitute a joint venture, partnership, or lease and nothing herein shall be construed to create such a relationship"; or the fact that in *Bab-Rand Co., supra,* very similar language was used by the Board itself to prove that *no* joint employer relationship existed?

The General Counsel's treatment of *S.A.G.E., Inc. of Houston,* 146 NLRB 325 (1964); *Bab-Rand Co.,* 147 NLRB 247 (1964); and *Esgro Anaheim, Inc.,* 150 NLRB 401 (1964), is equally puzzling. He mentions these cases in passing, at footnote 22, page 39, but airily dismisses them as "inapposite" without further discussion. They have not been specifically reversed by the Board. Yet in each of these cases it is a fair statement to say that the Licensor exercised much greater control over the labor relations of its Licensees than does K-Mart. Actually the quantum of K-Mart's labor relations control is zero. Two of these cases, *Esgro Anaheim* and *Bab-Rand, supra,* involve White Front stores. White Front's Rules and Regulations are appended as Appendix A to this Reply Brief [Vol. III, G.C. Ex. 6, Appendix C]. Appendix B hereof contains the White Front License Agreement. The Court will note from a reading of these documents

that they give White Front tight control over labor matters of the Licensees. White Front was also involved in *New Fashion Cleaners, Inc.,* 152 NLRB 284 (1965), and *Triumph Sales, Inc.,* 154 NLRB 916 (1965), in both of which the Board refused to find a joint employer status.

We are intrigued by the General Counsel's failure to attempt to distinguish the instant case from the four White Front cases, and particularly from *Triumph Sales, supra.* On January 3, 1967 the Chairman of the National Labor Relations Board transmitted to the Executive and Legislative branches of the Government the *Thirty-First Annual Report of the NLRB.* At page 53 of his *Report* the Chairman stated as follows:

> In *Triumph Sales,* the Board found that effective control over the attributes of the employment relationship with employees of the licensee operating the chain's liquor departments, including the handling of grievances, was lodged with the licensee rather than being jointly controlled with the licensor. It therefore concluded that the licensor was not a joint employer of the licensee's employees and directed elections sought by the licensee in units limited to his employees. * * * In *K-Mart,* however, the owner of a retail chain and the various licensees at one of the stores were held to be joint employers of the licensees' employees, and the requested storewide unit of employees was found appropriate. The Board found that the license agreement and related rules and regulations issued by the owner, which even included a provision whereby the owner sought to prohibit the continuance of labor disputes in which the licensees might become involved, established substantially joint control over working conditions and wage rates of the licensees' employees.

It is readily apparent that the Chairman's analysis of *Triumph Sales* should have been applied in this case, since it is K-Mart's Licensees that have "effective control over the attributes of the employment relationship" of their own employees, and not K-Mart. Such control is not "jointly lodged" with K-Mart and it is error to suppose that the facts and Record show otherwise. The Chairman's conclusions are demonstrably false. The fact of the matter is that the White Front License Agreements—not K-Mart's—provides that the Licensees agree to be bound by collective bargaining agreements negotiated by the licensor (See Appendix B pp. 23-26 and see n. 4 of the Opening Brief). From this, one must conclude, if anything, that *White Front* thereby controls the labor relations of its Licensees. How it was found that K-Mart controls the labor relations of its Licensees when no similar provision is found in either its License Agreement or its Rules and Regulations is not explained. The Chairman's *Report* should read exactly the reverse, with the findings as to *Triumph Sales* applying to *K-Mart*.

It is interesting to note that the General Counsel's Brief in this case does not comport with the views of the Chairman as expressed in the *Report*.

Having brushed aside *S.A.G.E., Bab-Rand* and *Esgro Anaheim,* the General Counsel likewise dismissed *Thriftown, Inc.,* 161 NLRB No. 42 (1966), as merely one of a series of cases where the Board made a finding of a joint employer status. There is no answer to the question whether it is the philosophy of *Thriftown* which dictated the decision in the instant case. There is no comment attempting to reconcile *Thriftown* with *S.A.G.E., Bab-Rand,* and *Esgro Anaheim.* Here again we think this Court is entitled to a full and fair discussion of this issue.

The General Counsel (and the Union in its Brief) place great reliance as precedent on the *Checker Cab*

Company case, 367 F. 2d 692 (6th Cir. 1966) and *NLRB v. S. E. Nichols Co.,* 380 F. 2d 438 (2d Cir. 1967) as well as the two *Greyhound* cases, *Boire v. Greyhound Corp.,* 376 U.S. 473, 11 L. Ed. 2d 849, 84 S. Ct. 894, 55 LRRM 2694 (1964); *NLRB v. Greyhound Corp.,* 368 F. 2d 778, 63 LRRM 6434 (5th Cir. 1966). *Checker Cab* was a unique case involving the relationships peculiar to a modern taxicab company in a large city and the Court itself said "this case is *sui generis.*" *Id.* at 696. The *Greyhound* cases were based upon a factual situation under which Greyhound had the right to establish work schedules, the right to assign employees to perform the work, the right to specify the exact manner and means through which these employees did their work and the right to control the straight time wage rates. Moreover, Greyhound supplied detailed supervision. Not one of these facts is present in the case here before the Court. In *S. E. Nichols, supra,* while the Licensees had the right to hire employees, the Licensor thereafter controlled them, determined their wage and fringe benefits, supervised them, had the right to fire them, and had the right to intervene in the Licensees labor disputes. On the facts, none of these cases is applicable.

In closing this portion of our Reply Brief argument, we state what by now must be obvious: The Board is wandering in a welter of confusion. There is no certainty in any of its proceedings involving the joint employer issue. Should Regional Directors (and businesses when drawing license agreements) follow *Bab-Rand Co., Esgro Anaheim, Inc., S.A.G.E.* and similar cases; or the *K-Mart* decision; or *Thriftown?* None agrees with the other. We earnestly believe that this is the case and the time to provide direction for the Board and for those who come before it in this area.

II.
ARGUMENT.

Despite the Board's Novel Attempts to Minimize Them, K-Mart's Objections Remain Viable and Should Be Sustained.

Introduction.

Having previously deprived K-Mart of the right to an administrative hearing on the issues raised by its objections to the election (and in so doing necessarily conceding the accuracy of all employee-witnesses' testimony in support thereof), the Board has, by this action, forced its General Counsel to the unenviable and imposing task of attempting to minimize or explain away the clear implications of unlawful union conduct.

In most instances K-Mart's objections are blithely dismissed for various reasons, which shall be explored below, because the union action under scrutiny allegedly had no "significant impact" on the election (Resp. Br. pp. 53, 54, 58, 60).

In those remaining instances where the union's conduct defies rationalization, the General Counsel has resorted to what can only be interpreted as unwarranted distortions of fact in order to legitimatize the union's pre-election activity.

Accordingly, this portion of the brief will be devoted to pointing up those areas of significant weakness in the Board's argument, demonstrating that the Board's decision on K-Mart's objections is untenable.

A. The Union's Deliberate Misrepresentation of Union Wage Rates, a Matter of Utmost Concern to Employees, Necessitates the Invalidation of the Election.

In answer to K-Mart's assertion that a union leaflet distributed on the evening prior to the election falsely compared union and K-Mart rates (objection 3),

the Board at some length describes its policy of distinguishing between "gross inaccuracies", for which elections will be set aside, and those "minor distortions" which the electorate can evaluate and discount, concluding in the words of the Seventh Circuit in *Olson Rug Co. v. NLRB,* 260 F. 2d 255, 257 that: "Prattle rather than precision is the dominating characteristic of election publicity." (Resp. Br. pp. 53-54).

The difficulty with this glowing generality is that it offers no guidelines for determining in any specific case whether a misrepresentation is "grossly inaccurate" or a "minor distortion."

We suggest that one of the principal factors in making such a determination is to analyze the *subject* of the misrepresentation. Where, as here, that subject is *wages,* the misrepresentation has struck at the very core of collective bargaining objectives. This fact has been recognized by the Court in *NLRB v. Houston Chronicle Publishing Co.,* 300 F. 2d 273 (5th Cir. 1962) which set aside an election declaring:

> "Purportedly authoritative and truthful assertions concerning wages . . . of the character of those made in this case *are not mere prattle; they are the stuff of life for Unions and members the selfsame subjects concerning which men organize and elect their representatives to bargain.*" (Emphasis added).

Similar conclusions based on misleading wage comparisons virtually identical to the one at bar were reached in *U.S. Rubber Co. v. NLRB,* 373 F. 2d 602 (5th Cir. 1967) and *Graphic Arts Finishing Co., Inc. v. NLRB,* 380 F. 2d 893 (4th Cir. 1967). Merely *saying,* as the Board does (Resp. Br. pp. 56-58), that these cases are distinguishable, *hardly* distinguishes them.

Additionally, the Board persists in its contention that the election eve falsity was "cured" by a leaflet mailed to virtually every employee some eleven days prior thereto, which stated the true fact that the union rates applied only after one year of service (Resp. Br. p. 55). Yet even this prior leaflet did not disclose the entire truth—that the given wage rates were the *highest* in each listed category.

Moreover, this doctrine of "cure-back" has heretofore been rejected by the Board itself in *Bowman Biscuit Company,* 123 NLRB 202 (1959), (as was pointed out in the Opening Brief, p. 70), a case where the truthful information was distributed *just one day* before the fraudulent circular. Further, as a matter of logic, employees would surely tend to resolve any conflict between the two leaflets in favor of the more recent one—the false leaflet distributed on election eve.

As a further novel contention the Board asserts that employees could have resolved any doubts fostered by the leaflet by inquiry at Food Giant and White Front Stores, allegedly located in the same shopping center as K-Mart (Resp. Br. pp. 55-56).

There is no evidence in this record, and it is not true, that a White Front store is located in K-Mart's shopping center. Moreover, inquiry at a Food Giant store would be fruitless because the latter is a grocery chain, not a discount operation and under a totally different type of contract. But beyond this, no K-Mart employee, even assuming he had a duty to do so, would have had a reasonable opportunity to check those stores in the few hours left to him before the election, and it is undenied that K-Mart never had an opportunity to answer these representations.

In summary, the record discloses that the misrepresentation was substantial; that the true facts regard-

ing union rates were within the knowledge of the union, and that K-Mart employees did not have either independent knowledge or sufficient time to gain the same, in order to have evaluated the statements. Under a solid line of Board and Court cases, the leaflet in question must be held to have unlawfully affected the election. *Hollywood Ceramics,* 140 NLRB 331 (1962); *Graphic Arts Finishing Co., Inc. v. NLRB, supra.*

B. The Board's Assertion That Union Threats and Coercion Did Not Invalidate the Election Is Contrary to the Facts and Law of This Case.

The Board attempts first to support its finding with respect to the Elaine Williams incident (objection 1) wherein she was told by a union agent, "If you don't join and the union is voted in, you will lose your job" [Vol. III, G.C. Ex. 32, Ex. "A"], by inserting a wholly gratuitous and speculative interpretation of that statement as follows:

> "A reasonable interpretation of this statement was, as indicated by the Regional Director's investigation, merely an over-simplified prediction of what would happen *if* the Union were voted in, and *if* it succeeded in its bargaining for a union-security clause in its contract." (Resp. Br. p. 49).

Yet if Williams' testimony is to be assumed true, the Board is bound to concede the accuracy of her entire affidavit *including the portion which indicates what the union agent told her and that Williams regarded the statement as a threat,* not just the innocuous lecture on a union security clause the Board makes it out to be. Thus Williams further testified:

> "At this point I took the envelope, turned away, and went for my bus and made no reply to his *threat.*" [Vol. II, G.C. Ex. 32, Ex. "A" p. 2]. (Emphasis added).

The Board, in effect, is now telling Elaine Williams that she was wrong; that no threat was intended; that she should have regarded the statement as "merely an oversimplified prediction" (Resp. Br. p. 49). The simple answer to this contention is that this was *not* what the union agent told Williams and that this was *not* the way Williams, reasonably, understood the remark.

The Board cannot have its cake and eat it too; it cannot assume the accuracy of Williams' testimony for purposes of bypassing a hearing and then contest Williams' version as to what the union's agent told her and how she, in turn, interpreted it.

Williams sincerely believed, and reasonably so, that she had been threatened with lost employment. This was sufficient, standing alone, to upset "laboratory conditions" and overturn the election. See *Seamprufe, Inc.,* 82 NLRB 892 (1949), aff'd in *Lane v. NLRB,* 186 F. 2d 67 (10th Cir. 1951) where a similar threat was held to be an unfair labor practice as well.

Next the Board argues that the utterance be disregarded because, if anything, it would "tend to encourage him (her) to vote against the union." (Resp. Br. p. 50). This averment, raised here and elsewhere in the Board's brief with respect to other employees expressly or implicitly threatened (Resp. Br. p. 53) is nothing more than pure speculation. No one, including the Board, has any means of knowing which way Williams voted. However, an intimidated vote for either side is not a rational vote, because fear does not produce rationality. The rule of "laboratory conditions" exists so that voters can exercise a choice free of undue extrinsic coercion or pressure to vote *either way,* in order that the result is a true reflection of uninhibited employee sentiment. Were the Board's argument here to be taken to its logical extreme, the union did not go far enough with its threats; if Williams (or Crab-

tree or Hosey or Castanon) had been physically assaulted, instead of orally threatened, these employees would even more surely have voted against the union. In other words, the more aggravated the union's conduct, the less objectionable it becomes. Such a rule would lead to havoc in organizing campaigns. It must be rejected.

The threat directed toward Linda Crabtree that "if the union gets in, and you don't vote for us, you'll be looking for another job" [Vol. III, G.C. Ex. 32, Ex. "B"] (objection 1) was perhaps even more pointed than that aimed at Williams because the threat of lost employment there was expressly conditioned on the way in which Crabtree voted and, as such, unquestionably amounted to objectionable conduct, if not an unfair labor practice. *cf. Montgomery Ward & Co., Inc.,* 142 NLRB 650 (1963).

The Board first contends that there is no evidence showing the remark was attributable to the union or that it was communicated to other employees. Therefore, it is argued, no atmosphere of fear and reprisal was created (Resp. Br. p. 50). Contrary to this contention, *all* the record evidence establishes that the threat emanated from a union representative. Crabtree stated that although the caller did not identify himself by name, in response to her query, he declared he was a "union representative", [Vol. III, G.C. Ex. 32, Ex. "B"] and the accuracy of her testimony has been conceded. There is no evidence whatever that the union was *not* responsible for the remark. Indeed, the Regional Director evidently did not even attempt to solicit a union denial of this incident [Vol. III, G.C. Ex. 28(a), pp. 5-6].

The fact that this threat was not communicated to other employees is entirely immaterial. Here, of course, the intimidation of a single employee could have

changed the election result. But even if this were not the case the Board, under long-established policy, will set aside an election unless *all* employees are afforded an opportunity to register a free and uncoerced choice regardless of whether its outcome is affected. *G. H. Hess, Inc.*, 82 NLRB 463 (1949); *U.S. Rubber Co.*, 86 NLRB 315 (1959); *National Gypsum Co.*, 133 NLRB 1492 (1961).

As a last resort, the Board argues that Crabtree's free choice was not impaired because her termination, she should have known, couldn't have been effectuated without K-Mart consent and that since the ballot was secret, any fear that the union would discover how she voted should have been dispelled (Resp. Br. p. 51).

The above argument is simply makeweight. Eighteen-year old Linda Crabtree could just as reasonably have believed that the union had the power to fire her if it won the election. All employees know that a victorious union has certain rights, one of which, it here proclaimed to Crabtree, was the right to fire her. Can the Board say, without benefit of a hearing, that Crabtree could not reasonably have believed the union had the ability to carry out this threat? We think not.

The further contention that a secret ballot election negated the threat does not stand inspection. There is absolutely no evidence that Crabtree attended the so-called "anti-union pre-election speech of March 31, 1965", or that she knew the election would be by secret ballot or, if so, its significance. The Board has here indulged once again in pure conjecture to shore up an erroneous conclusion.

With the Leo Hosey incident (objection 2) the Board is backed squarely up against the wall. It must finally, and for the first time, acknowledge that Michael Cas-

tanon exists and that he overheard and corroborated the following threat made by a union agent to Hosey:

> "You, we don't want. You'd better hope that the union doesn't get in" [Vol. III, G.C. Ex. 28(a), Ex. "E"].[2]

even though a frightened Hosey later denied the threat.

The sole contention raised by the Board here, feeble as it is, is that the threat "would appear to constitute an inducement to vote *against* the union, not for it." (Resp. Br. p. 52). Not only is this assertion gross conjecture but within the realm of speculation, it is more probable that the threat would coerce and intimidate the victim into voting *for* the union rather than against it.

Finally, the Board urges that since the remarks were limited in impact to four employees in a unit of eighty, there was no "general atmosphere" of fear and reprisal created and therefore no warrant for setting aside the election (Resp. Br. pp. 52-53). Initially K-Mart does not concede for a moment that no general atmosphere of fear and reprisals existed. For example, Leo Hosey was threatened in front of Michael Castanon [Vol. III, G.C. Ex. 32; Ex. "E"], and, as indicated in the affidavit of Irene Reyes communicated his feelings to a fellow-employee, Richard Castillo, and to Reyes who was within earshot [Vol. III, G.C. Ex. 32, Ex. "F"]. Thus, this incident alone was admittedly relayed to at least three other employees. And it is not straining probability to assume that the various threatened employees told others in the store of these incidents. This precise situation was presented to the Board in a recent case, *Intercontinental Mfg. Co., Inc.,* 167

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[2]The Board has never before, at any stage of this proceeding given any credit or even discussion of the Castanon testimony. See for example Vol. III, G.C. Ex. 28(a), p. 6; G.C. Ex. 35; Vol. I, p. 325 n. 1.

NLRB No. 105 (October, 1967) where employer conduct was held to have affected only six employees out of a total of 730 eligible voters, the Board stating,

> "*However, the restraining effect of coercive conduct is not limited to employees directly involved.* Rather, the Board and courts have long recognized that employer interrogation and threats concerning union activity during a pre-election campaign are likely to receive prompt and wide circulation. Therefore, to evaluate properly the probable effect of conduct which is coercive in nature, *the number of employees directly involved cannot serve as a determinative factor. The controlling factor here is whether the conduct involved tends to interfere with a free and uncoerced choice by the employees.*" (Emphasis added).

Quite obviously the same holds true with respect to union statements.

Finally, even assuming "only" four employees of potentially eighty were affected, to say the election needn't be set aside is, under the circumstances of this case, sheer nonsense. This election was decided by just one vote. If any one of the affected employees was intimidated into voting for the union, its tenuous majority is a sham. Despite the Board's protestations to the contrary, it is beyond question that in each incident heretofore discussed the union greatly exceeded the bounds of permissible pre-election activities, creating an election which was tainted by the effects of its coercive tactics.

C. The Board's Attack on the Employee Platteborze Is Based on Distortions of the Record Evidence and Unwarranted Inferences Drawn Therefrom.

On the very morning of the election a union representative made numerous misstatements on material matters to a 19 year-old employee of the K-Mart store, Carol Platteborze (Objection 6).

The Board's entire approach to this objection has been to characterize Platteborze as a "listening post for management" who solicited answers to "questions she had rehearsed earlier with the K-Mart Assistant Store Manager Robinson" (Resp. Br. pp. 59-60), in an attempt to impute to her a management bias and therefore to nullify the effect of the obviously false statements made to her on election morning by union agents.

There is absolutely no warrant for an inference that Platteborze was pro-management. Indeed, as she put it in her affidavit, "When the union campaign first began in our store, I thought the union sounded like a good idea. Later, questions came to mind, and I wrote these down. I took this opportunity to ask the questions over the telephone." [Vol. III G.C. Ex. 32, Ex. "J"].

Platteborze's affidavit, which the Board has ostensibly assumed to be accurate, discloses only that Platteborze told Assistant Manager Robinson that she intended to ask the union certain questions. There is no evidence that she informed him of the content of any specific question or that they had even been reduced to writing at the time, let alone "rehearsed." It is abundantly clear also that Platteborze later acted to satisfy her own curiosity in asking these questions. Only secondarily did she inquire of the store Assistant Manager whether he would wish to see the answers,

in light of their earlier conversation. The affidavit taken as a whole, contradicts any inference that management suggested the questions to Platteborze or solicited the answers she later obtained.

Implicit in the Board's entire argument is the totally unwarranted assumption that an employee such as Platteborze, who furnishes information to management is necessarily "aligned" with management. It evidently has never occurred to the Board that a neutral employee, desiring to make an informed choice, might wish management's, as well as the union's view, on the questions she had raised.

All of the inferences drawn by the Board with respect to Platteborze have been conjured up out of thin air. Flagrant misrepresentations of fact and law were admittedly made to her by union representatives on the day of the election, in order to influence her vote. This conduct cannot be so easily brushed aside; it requires voiding the election.

D. K-Mart Sustained Its Burden of Proving That a Union Letter Falsely Represented Facts With Regard to the Payment of Union Dues.

The pre-election letter and union newspaper article supplied by K-Mart [Vol. III, G.C. Ex. 32, Exs. "G" and "I", respectively] in support of its charge that the union falsely declared K-Mart employees would not be required to pay double dues (objection 4), the Board contends, did not sufficiently prove this falsity, over the union's assertion that K-Mart employees would not be required to pay double dues (Resp. Br. p. 541).

But what more proof could K-Mart have supplied in advance of the investigation on this objection? There was certainly no right under Board rules to conduct discovery or to examine union files. Note that the Regional Director's approach to this objection, adopted by

the Board, was completely *subjective: he* saw nothing in the letter directly contrary to the newspaper article [Vol. III, G.C. Ex. 28, p. 8]. But the Regional Director needn't have relied upon a personal opinion. The matter of double dues could have been verified objectively, *e.g.,* by an investigation of union records to ascertain what categories of employees were affected by the union's "double dues" resolution. There is no indication that he did so. The Regional Director's failure even to investigate the facts underlying this subject and the Board's concurrence in his procedure, defies explanation, yet is typical of the general approach to K-Mart's objections in this case.

Conclusion.

For the reasons set forth herein, and in K-Mart's Opening Brief, it is submitted that enforcement of the Board's Order be denied.

Respectfully submitted,

CLARK, KLEIN, WINTER, PARSONS & PREWITT,
JOHN DONNELLY,
Attorneys for Petitioner, K-Mart, a Division of S. S. Kresge Co.

Of Counsel:
HILL, FARRER & BURRILL,
STANLEY E. TOBIN

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STANLEY E. TOBIN

APPENDIX A.

WHITE FRONT
A DISCOUNT DEPARTMENT STORE

RULES AND REGULATIONS

WORK PERFORMANCE

1. Follow all instructions received from your department head, supervisor or manager.
2. Extend courtesy and cooperation to customers and fellow workers.
3. Be honest in all dealings with customers and the company.
4. Do your work productively and efficiently.
5. Observe safety precautions (see Safety Rules).
6. Practice good housekeeping in your work area or area of responsibility. Keep floor, aisles and doorways clear at all times.
7. Punch your time card:
   - A. On reporting for work.
   - B. On checking out and in for lunch, dinner, and rest periods.
   - C. Upon completion of work schedule.
   - D. If your department does not use time cards sign in and out as above on a time sheet.
8. None of the following will be tolerated:
   - A. Insubordination.
   - B. Engaging in horseplay, quarreling or fighting on company premises.
   - C. Use of intoxicants during working days or reporting for work with the odor of intoxicants on your person.
   - D. Possession of open bottles of alcoholic beverages on company premises.
   - E. Immoral behavior on company premises.
   - F. Any fraudulent act or statement.
   - G. Unauthorized possession of company funds, property or merchandise.
   - H. Punching another employees time card or permitting another employee to punch your time card or signing in or out for another employee or permitting another employee to sign in or out for you where time cards are not used.
   - I. Carelessness or intentional mishandling of company merchandise, property or equipment. Defacing of any company property, including rest rooms, walls and doors.
   - J. Excessive absence or tardiness, or absence without proper notice to management (leaves of absence require prior written approval).
   - K. Suffering wage attachments or harrassment of the company by your creditors.
   - L. Using White Front telephones for personal calls, except for emergency calls authorized by store or office management.
   - N. WHITE FRONT EMPLOYEES MAY NOT UNDER ANY CIRCUMSTANCES MARK DOWN PRICES OF MERCHANDISE.
   - O. All employees, when leaving a store at any time, should leave by doors designated by management. No one is permitted to leave through the receiving doors. ALL PACKAGES ARE SUBJECT TO INSPECTION.
   - P. Never use fire doors for entrance or exit. These doors are for emergency use.

DRESS AND APPEARANCE

9. All employees on store premises shall wear visibly displayed White Front badges.
10. All employees wear such items of attire as are furnished by White Front, except in those departments where different attire has been approved by management.
11. Grooming and attire should conform to the following requirements:
    - A. Women — Conservative hair style, light makeup, long hose, cardigan sweaters permitted, do not wear fancy jewelry or extreme colors in nail polish.
    - B. Men — Conventional haircut, kept combed and neatly trimmed; freshly shaven; clean white shirt, black necktie, freshly pressed, clean trousers. No blue jeans or sport shirts permitted.
12. Employees handling food will observe all rules of neatness and cleanliness required by law.
13. Employees keep personal belongings in the store at their own risk. White Front female employees are provided with lockers to store their purses while working. Valuables should be retained in your personal possession at all times. Employees shall not bring their radios to work.

EMPLOYEES SHOPPING AT WHITE FRONT

14. You may shop during your lunch hour or after completing your work.
    - A. Purchases must be taken through the DESIGNATED "Employee Purchase" check stand and must be accompanied at all times by a cash register receipt.
    - B. Purchased items shall be taken immediately out of the store or if time does not permit, left at customer service until departure from the store. Employees of lease departments may leave items purchased in their departments if authorized by that department.
    - C. Purchases must be removed by the employees in the same manner as by any other customer. Never buy merchandise from truck or service drivers who call at your store.

SAFETY

15. Observe store and plant safety regulations. Take care to prevent accidents and fires. Work safely.
16. Smoke only in authorized places, never on sales floor, stockrooms or dock.
17. Report immediately to your store manager or department head if you have any accident or injury on the job. Report immediately to your store manager or department head accidents or injury suffered by a customer.

RELIEF PERIODS

18. Take your relief period as authorized by your supervisor.
19. Consumption of food and beverages is permitted only in the employees lunch room or at the snack bar.

GIFTS AND SOLICITATIONS

20. Do not solicit gifts or samples from salesmen or suppliers. Any samples received are the property of your employer.

ATTENDANCE, STATUS AND PAY

21. Report to work and leave on time.
22. Any overtime must be approved by your supervisor.
23. Work schedules will be posted in a convenient place, but it is your responsibility to keep informed when you will be expected to work if such a schedule is not posted. If you are sick or will have to be absent because of an emergency, notify your supervisor immediately. Notification to a fellow employee is not proper notice.
24. Advise your store manager or department head promptly of any change of name, address, telephone number, martial status, or number of dependents, so that company and income tax records may be kept current. Forms are available at store validation desk.
25. Cashing of employee payroll checks or personal checks is subject to the same policy as are similar checks presented by customers.

PARKING

26. Park your car in the area designated by the store manager when employee parking is permitted on the White Front lot. The maximum speed limit on the parking lot must not be exceeded.

ANY VIOLATION OF THE ABOVE RULES AND REGULATIONS IS SUBJECT TO APPROPRIATE DISCIPLINARY ACTION INCLUDING DISCHARGE.

I HAVE READ ALL THE ABOVE RULES AND REGULATIONS AND UNDERSTAND WHAT THEY MEAN.

APPENDIX B.

License Agreement.

WHITE FRONT STORES, INC., a corporation, hereinafter referred to as "LICENSOR," and ...., hereinafter referred to as "LICENSEE," hereby agree as follows:

1. DESCRIPTION OF PREMISES.

Under the terms of a written agreement of lease, Licensor is the lessee of the premises commonly known and described as ....., in the City of ....., State of California, on which Licensor is operating a discount department store under the trade name "White Front." In this connection, certain of the departments in said discount department store are operated by Licensor and by licensees.

2. DEPARTMENT OF LICENSEE.

The department which shall be maintained and conducted by Licensee shall be located in the area of the premises hereinabove described in paragraph 1 and more particularly designated and shown on Exhibit "A" attached hereto and approved by the parties hereto. Licensor shall have the right, at any time during the term hereof, to change the floor plan and layout of Licensee's department, provided, however, that any such relocation shall be made at the expense of Licensor and after such relocation Licensee shall have approximately the same size area in a comparable location.

3. MERCHANDISE AUTHORIZED FOR SALE.

Licensor hereby grants to Licensee the exclusive license, right and privilege, for the term hereinafter specified, of conducting and carrying on in his department the retail sale of jewelry, cameras and photographic equipment, including incidental items now sold in the department, and Licensor grants to Licensee and the luggage department in said store, the exclusive license, right and privilege of conducting and carrying on in their departments the retail sale of wallets, and for no other purpose, without the prior written consent of Licensor. In this connection, Licensee agrees at all times to carry and maintain a well stocked, representative line of good quality merchandise which he is authorized to sell in his department, and that he will not engage or have any interest in any other retail business involving the sale of such merchandise elsewhere than the Licensor's said store.

4. TERM OF LICENSE.

This license shall commence on ....., and shall terminate and end at the close of business on ...., unless sooner terminated as hereinafter provided in this agreement.

5. COMPENSATION TO BE PAID LICENSOR.

(a) *Minimum Compensation.* In addition to all other payments required of Licensee hereunder, Licensee agrees to pay Licensor a minimum annual compensation, hereinafter sometimes referred to as "Minimum Monthly Compensation," of Six Dollars ($6.00) per square

foot of selling space, in successive equal installments on the first day of each and every calendar month during the term hereof.

(b) *Percentage Compensation.* In addition to the minimum monthly compensation, Licensee shall pay each year but in monthly installments as hereinafter provided, as additional compensation, the amount, if any, by which .... of Licensee's total gross sales exceed the minimum compensation for such year. Said additional compensation is hereinafter somtimes referred to as "percentage compensation."

(c) *Accounting and Settlement.* Licensee agrees to deliver to Licensor within twenty-five (25) days after the close of each calendar month of each year, during the term of this License Agreement, a "Monthly Statement of Gross Sales" (as hereinafter defined), showing the gross sales of Licensee during such month. Within thirty (30) days after the close of each year, during the term of this agreement, or any extension thereof, Licensee agrees to deliver to Licensor a "Certified Statement of Gross Sales," showing the gross sales of Licensee during said year. Concurrently with the submission of any such statement, Licensee shall pay to Licensor the amount shown to be owing to the Licensor. The "Monthly Statement of Gross Sales" shall be a statement of Licensee's gross sales for the calendar month for which the same is required, prepared by Licensee's regularly employed accountant or bookkeeper, and certified by Licensee or a responsible officer of Licensee to be correct. The "Certified Statement of Gross Sales" shall be a complete and appropriately

certified statement made by a Certified Public Accountant and signed by Licensee or a responsible officer of Licensee, showing accurately and in reasonable detail the amount of the gross sales of Licensee for the year for which the same is required.

(d) For the purpose of computing the percentage compensation, the first year shall be deemed to end twelve (12) calendar months after the commencement date of this License Agreement, or in the event the commencement date occurs on a day other than the first day of a calendar month, then twelve (12) calendar months after the first day of that calendar month next succeeding the commencement date and each successive twelve (12) months' period shall be deemed a year.

(3) *Gross Sales.* As used herein "gross sales" shall mean and include the actual gross sales price of all merchandise sold or contracted to be sold, and all charges for labor, services or commodities of any kind made in, from or through the medium of Licensee's department, regardless of whether the aforementioned sales and charges, or any part thereof, be for cash or other consideration or for credit, and if for credit, whether collection be made or not. There shall be deducted in the ascertainment of gross sales the following:

(1) the sales price of merchandise returned for credit or refund;

(2) the actual amounts due or payable to the municipality wherein Licensee is operating his department, the State of California, the Government of the United States or any other governmental authority for or as a sales tax or excise tax;

(3) income covering watch repairs, providing such income does not include any profits to Licensee; and

(4) sales at discount made to employees of Licensor and Licensee and to suppliers but not in excess of One Percent (1%) of Licensee's annual sales.

(f) *Recording of Sales.* Licensee agrees to use for the recording of each and every sale and other gross charges such cash registers, devices, methods and records as are usually used in well-conducted merchandise stores, and to permit Licensor's representatives to inspect original records, methods, devices and machines or whatever, in the judgment of Licensor, shall pertain to the verification of the reports of gross sales as hereinbefore defined. Licensor shall have the right to select and designate an auditor to make an individual audit and investigation to ascertain the correctness and accuracy of all statements and reports presented by Licensee, at Licensor's expense. For the purpose of enabling Licensor to have such audit and investigation conducted, Licensee agrees that the agent or agents of Licensor shall have full access to books and records of account of Licensee of the business conducted in his department.

6. OPERATION OF DEPARTMENT.

Licensee, in his dealings with the general public, shall conduct said department as an integral part of said general department store and/or stores operated by Licensor, and all sales made in said department by Licensee shall be made in the name of Licensor. Licensee shall have no right, either directly or indirectly

or in any manner, to use the name of Licensor, or any other trade name used by Licensor, in any other place of business conducted by Licensee during or after the termination of this License Agreement. Licensee, however, shall purchase in his name and pay for his own merchandise and on his own responsibility and account and shall, likewise, employ and be responsible for help in his department. Neither Licensee, nor any of his employees shall engage in any conduct which shall be detrimental to the operation of Licensor's business. It is understood and agreed that Licensee at all times shall follow the policies adopted by Licensor in connection with the operation of said general department store and/or stores in every respect, including but not limited to, sales and return privileges, lay-a-way plans, charge accounts, sales promotions, signs, displays and hours during which Licensee's department shall remain open. Keys to Licensee's department shall be kept by Licensor and Licensee. Licensee shall not use the trade name "White Front" on any merchandise sold in its department. Licensee shall maintain accurate and detailed records of its purchases and sales, and hereby agrees to permit the Licensor, at all reasonable times during or after the termination or expiration of this License, to examine the same to determine the total amount of sales and the gross mark-up of merchandise sold in said department by Licensee, and to ascertain compliance by the Licensee with all the terms hereof. Licensee shall submit to Licensor, each six (6) months during the term hereof, a financial

statement consisting of a balance sheet and a profit and loss statement covering the operation of said department. It is understood that as part of the general store policy all finance charges made by Licensee to its customers shall not be in excess of finance charges afforded by Licensor to its customers in other departments of the store. In this connection, Licensee agrees to use the finance company designated by Licensor to handle the financing of sales transactions to its customers.

All invoices presented to Licensee by Licensor shall be paid within a period of fifteen (15) days after presentation. Licensor agrees to use its best efforts to remit to Licensee any monies owing to Licensee within fifteen (15) days after receipt thereof by Licensor.

(a) *Competitive Pricing Policy and Gross Mark-Up.* Licensee agrees that Licensee's prices for merchandise sold in its department shall at all times be competition on each item with other like merchandise sold in other stores in the area of the store covered by this License Agreement (for the purpose hereof, "competitive" shall not require the Licensee at all times to meet every lowest price charged by competitive merchants); in addition, Licensee agrees, at the request of the Licensor, to meet the lowest price of any competitive store in the trading area of the store on specific items. In addition thereto, and not in limitation of the foregoing, Licensee agrees that his gross mark-up percentage computed on Licensee's selling price above his actual cost shall not

be in excess of the following percentages with respect to the following categories:

Category	Maximum Mark-Up Percentage Computed on Selling Price
Cameras and Optical Items	25%
Films	20%
Branded Typewriters	20%
Other Typewriters	28%
Electric Shavers	25%
Costume Jewelry	38%
Watches	35%

(b) *Fair Trade Prices.* The terms and conditions provided for in this License Agreement covering pricing of merchandise sold by Licensee to customers in his department shall not relate to merchandise covered by Fair Trade laws which are enforced in the State of California. In this connection, Licensee agrees that he will not knowingly sell merchandise in his department below the established Fair Trade prices covering merchandise.

7. UTILITIES AND ADVERTISING.

(a) Licensor, at its expense, agrees to supply heat, light, power, gas, water and maintenance service for the operation of said department, without additional expense to Licensee; provided, however, that Licensor shall not be responsible for damages or losses of any nature that may result from any interruption of any of the aforesaid services.

Licensee shall provide and pay for his own telephone facilities, stationery, boxes, wrapping material, sales slips and other supplies needed in his department. All such boxes and wrapping material used by Licensee in

his department shall be the same in design and appearance as suggested by Licensor.

(b) All advertising of Licensee's department shall be approved by and publicized under the name of Licensor and the media, content, item and space of such advertising shall be in the sole discretion of and channeled through Licensor's advertising department.

In addition to all other payments and compensation required of Licensee hereunder, Licensee agrees to expend monthly a minimum of Two Percent (2%) of his gross sales made each month during the term hereof, for advertising in newspapers which shall be invoiced to Licensee by Licensor at Licensor's actual cost, excepting that for the month of December of each year during the term hereof Licensee shall expand not less than One Percent (1%) of his gross sales made for said month of December, providing that the total percentage expended by Licensee for said twelve (12) month period is not less than Two Percent (2%) of his gross sales made during said twelve (12) month period. In this connection, it is agreed that if rebates which Licensor shall receive from newspapers covering its advertising shall be less than Ten Thousand Dollars ($10,000.00) per annum in any license year, then Licensee shall not participate in any such rebates. However, should such rebates be in excess of Ten Thousand Dollars ($10,000.00) per annum, then Licensee shall participate in such rebates in the proportion that the number of inches placed and paid for by Licensee bears to the total number of inches placed by Licensor. In the event Licensee fails to expend monthly a minimum of Two Percent (2%) of Licensee's gross sales made each month during the term hereof in advertising in newspapers,

then and in that event, Licensee agrees to pay Licensor as further compensation the difference between the amount Licensee has so expended and said sum of Two Percent (2%).

In connection with "special promotions," Licensee agrees to participate in all newspaper, special newspaper sections or direct mail advertising proposed by Licensor, in the same proportion that Licensee's ads usually occupy in the normal advertising of Licensor, but in any event not less than the ratio that Licensee's sales bear to the total sales made by Licensor and all licensees in said store. However, it is understood that this provision shall not compel Licensee to expend more than Two Percent (2%) of its sales for advertising. In this connection, Licensee agrees to pay the cost of such advertising covering such "special promotions" as may be agreed upon between the parties but which shall be at the same rate as that paid by other licensees of Licensor, but in any event at the actual cost of Licensor. In the event Licensee does not question the correctness of any invoice submitted to Licensee by Licensor covering Licensee's portion of the cost of advertising, within a period of forty-five (45) days after receipt of such invoice, then and in that event, Licensee shall be estopped from thereafter questioning the correctness of said submitted invoice.

Licensee warrants that all advertising submitted to Licensor for publication in its advertisements covering merchandise sold in Licensee's department is not in violation of any federal, state or local laws or ordinances.

Licensee agrees to participate in each newspaper advertisement of Licensor, unless Licensor otherwise agrees.

8. INSURANCE.

Licensee agrees to take out and keep in force during the term hereof, at Licensee's sole expense, workmen's compensation insurance covering all of its employees in its department, and property damage insurance in the sum of Twenty-Five Thousand Dollars ($25,000.00) to protect against liability to the public or property incident to the use of or resulting in any way from accidents occurring in, upon or about said department. Licensee further agrees to carry public liability insurance and products liability insurance in such amounts as Licensor shall determine and which public liability and products liability insurance shall be procured by Licensor and shall be paid for by Licensee. All such insurance shall be written in such manner as to protect the interests of Licensor and Licensee. Licensee shall supply Licensor, during the first month of the term hereof, with a copy of either the insurance policy or a certificate of the insurance company issuing such insurance, and Licensee hereby agrees that the insurance and certificate shall be in such form and substance as shall be acceptable to Licensor, and all such insurance shall not be cancelable until Licensor has been given thirty (30) days' advance notice in writing of such cancellation by the insurance company writing such insurance.

9. COMPLIANCE WITH LAW.

Licensee agrees not to use or permit the department to be used and operated in violation of any law, ordinance or regulation of any governmental authority or in any manner which will constitute a nuisance, and Licensee further agrees that Licensee, at its sole expense, will conform in every respect to all laws, ordinances and

regulations now in force or that are enacted or adopted hereafter which affect the use or occupancy of Licensee's department.

Licensee shall, prior to the commencement of the term of this License Agreement, present to Licensor a photostatic copy of the sales tax permit obtained by Licensee from the California Board of Equalization permitting Licensee to conduct the business provided for in this License Agreement.

10. PAYMENT OF TAXES AND LICENSE FEES.

Licensee shall, at its sole expense, pay all license fees, sales taxes, payroll taxes, personal property taxes, and all other taxes which may be levied or assessed on the business conducted by Licensee or on the fixtures, equipment and merchandise carried in said department and Licensor shall have no responsibility in connection therewith.

11. FIXTURES.

Licensee, at its sole expense, shall install all fixtures, cash registers and equipment necessary to properly display, sell and conduct said department, and in this connection it is understood and agreed that the selection of said fixtures, cash registers and equipment, and the installation thereof, shall be subject to the approval of Licensor. Licensee shall, at all times during the term hereof, maintain, at its sole expense, the upkeep and maintenance of said fixtures, cash registers and equipment.

12. OPTION TO PURCHASE AND COVENANT NOT TO COMPETE.

Upon the termination or expiration of the License Agreement, the Licensee grants to Licensor the options (a) to purchase all of Licensee's right, title and interest in and to the fixtures and equipment then in the department and/or (b) all of Licensee's right, title and interest in and to the good will of the business carried on by Licensee under this agreement. Title to said fixtures and equipment and/or to said good will of said business shall, immediately upon the exercise of said option to purchase by Licensor, be transferred to Licensor and Licensor shall at that time pay Licensee therefor, as follows: for said fixtures and equipment, the cost thereof to the Licensee, including installation and wiring, less the depreciation thereof prorated at the rate of Twenty Percent (20%) per annum from the date of purchase of said fixtures and equipment by Licensee; for the good will, the purchase price shall be Twenty-Five Dollars ($25.00) per location. In the event said fixtures and equipment were purchased by Licensee more than five (5) years prior thereto, then and in that event, Licensor shall pay Licensee the total sum of Twenty-Five Dollars ($25.00) per location for all of Licensee's interest in said fixtures and equipment and said good will of said business.

As part of the consideration paid Licensee for the good will of the business carried on by Licensee under this agreement, Licensee agrees that upon the termination of this agreement it will not conduct or engage in any retail business handling any of the types or categories of merchandise listed in Paragraph 6(a) in any other discount store in Southern California, nor within

an area of five (5) miles from any place or places of business conducted by Licensor in the State of California, for a period of two (2) years from the date of termination of this License Agreement.

In this connection, it is understood that all custom made fixtures and specialized equipment and cash registers used by Licensee in its department are not included in the term "fixtures and equipment".

Licensee shall submit to Licensor, within sixty (60) days after the commencement of the term hereof, a certified statement of the cost of the fixtures, including the cost of installation and wiring, and equipment purchased and installed in Licensee's department.

13. ALTERATIONS.

Licensee shall make no alterations, additions or improvements in or to Licensee's department without the prior written consent of Licensor. Licensor may make necessary or proper alterations, additions or improvements to said department and no exercise of any such rights shall entitle Licensee to damages for injuries or inconvenience occasioned thereby, but such work shall be done in such manner as to cause Licensee the least inconvenience practicable.

14. IDENTIFICATION.

Licensor shall not be liable to Licensee or any other person for or on account of any injury or damage of any kind whatsoever to persons or property occasioned in or about Licensee's department or wheresoever arising, or resulting from any patent or latent defect, structural or otherwise, in the construction, condition or present or future lack of repair of the buildings and improvements in said department. Licensee in-

demnifies Licensor against and agrees to hold Licensor harmless from any loss, damage, claim of damage, liability or expense, arising out of or resulting from any of the matters or things hereinabove specified, and from and against any damage or liability arising from any injury or damage or claim of injury or damage of any kind whatsoever to persons or property occasioned in or about said department during the term hereof and due, directly or indirectly, to the use, misuse or disuse by Licensee or by any of its agents, servants, employees or to the condition of said department or any part thereof or any equipment thereof or therein, or arising out of any failure of Licensee in any respect to comply with any of the requirements or provisions of this License Agreement.

15. DAMAGE OR DESTRUCTION.

In the event of damage to or destruction of Licensee's department by fire, earthquake or any other cause, so as to make it impossible to carry on business therein, and if said department cannot be repaired within sixty (60) working days, this agreement may thereupon terminate at the option of either Licensee or Licensor by giving written notice to the other party within thirty (30) days after the happening of such casualty. If this agreement is not so terminated, Licensee shall be entitled to a proportionate reduction in the payment of compensation provided for herein until said repairs are completed. Further, should Licensee be inconvenienced as the result of repairing said damage or destruction, Licensee shall not be entitled to any damages during the period of repair for inconvenience or denial of possession of said department. If this agreement is so terminated and Licensor shall, at a sub-

sequent date, reopen said jewelry and camera department, then and in that event, this License Agreement shall be revived for the balance of the term of this license.

16. NATURE OF AGREEMENT.

This agreement is not intended to create and shall not be considered as creating any partnership relationship between the parties hereto, or any relationship between them other than that of Licensor and Licensee, nor shall either party be liable for the debts of the other.

17. BANKRUPTCY AND INSOLVENCY.

If, during the term of this License Agreement, an involuntary petition in bankruptcy is filed against Licensee, and a Receiver is appointed, and is not removed within five (5) days, or if a voluntary bankruptcy petition, or a petition for reorganization or arrangement under any of the laws of the United States relating to bankruptcy, be filed by Licensee or be filed against Licensee, or should Licensee make an assignment for the benefit of its creditors, the occurrence of any such contingency shall be deemed to constitute and be construed a violation of the terms of this License Agreement, and Licensor, at its election, may terminate this License Agreement immediately upon the occurrence of any of said events. Should Licensor elect to terminate this License Agreement upon the happening of any such event, then Licensor, at the expense of Licensee, may remove all of Licensee's fixtures, equipment, inventory and all other property of Licensee from Licensee's department and place the same in storage in the name of Licensee. No person, firm or corporation,

other than Licensee, shall have the right to occupy the department of Licensee by virtue of any bankruptcy, receivership, insolvency or reorganization proceedings or suit in law or in equity. Further, in the event any of the assets of Licensee's department are levied upon under any attachment, garnishment or execution, or should a receiver or keeper be placed in said department resulting from any proceeding filed against Licensee in law or in equity, Licensor, at its election, may terminate this License Agreement unless such levy is released within five (5) days or said keeper or receiver is withdrawn within twenty-four (24) hours from the time such levy is made or said receiver or keeper is placed in said department.

18. RIGHTS AND DUTIES ON TERMINATION.

Upon the termination of the License hereby granted, Licensee shall not sell or permit the sale of any merchandise or of any fixtures or equipment from the premises and Licensee shall not in any way advertise or permit the advertising of the termination of its license or its right to sell merchandise in the department. Upon any such termination, Licensee shall immediately surrender said department to Licensor and, except as otherwise provided in this License Agreement, remove therefrom all stock in trade and other property which Licensee may be entitled to remove, and shall, at Licensee's sole cost and expense, do all things necessary to place said department in the same condition as before the use thereof by Licensee, reasonable wear and tear excepted. The rights herein granted to Licensor shall be in addition to any other rights or remedies to which Licensor may be entitled under law.

19. HOLDING OVER.

Any holding over by Licensee beyond the date of termination of this License Agreement as herein provided, shall for all purposes be construed to be on a day-to-day basis, subject to all of the terms, conditions and restrictions of this License Agreement.

20. ADDITIONAL EVENTS OF DEFAULT.

In addition to any other right granted herein or by law on the part of the Licensor to cancel or terminate this agreement, Licensor shall have the right to terminate this agreement as follows:

(a) In the event, during the first two (2) years of the term of this License Agreement, of the death of Francis J. Esgro or his physical disability which renders him unable, for a period of six (6) months to render full time executive services to the Licensee, and if, during the six (6) full calendar months immediately following the month of his death or such disability, as aforesaid, as the case may be, the aggregate gross sales of the jewelry and camera departments in all the White Front stores operated by Francis J. Esgro, or by corporations owned by him, in operation at the time of such death or disability is eighteen (18), or more, percent less than such sales in the same stores during the like six (6) month period in the preceding year, Licensor shall have the right, at any time within three (3) months following the expiration of such six (6) month period, to cancel and terminate this License Agreement.

(b) If Francis J. Esgro ceases to continue to act as full time chief executive officer, as herein required, of the Licensee otherwise than because of his death or

disability, as aforesaid, the Licensor shall have the right, at any time within three (3) months following the date when the Licensor has actual notice and knowledge of such cessation, to cancel and terminate this License Agreement.

(c) If any of the capital stock of the Licensee or of any other interest in the operation of the licensed department is disposed of by Francis J. Esgro, or is transferred whether by operation of law or otherwise, the Licensor shall have the right at any time within three (3) months following the date when the Licensor has actual knowledge of such disposition or transfer to cancel and terminate this License Agreement, but such restriction shall be inapplicable if such disposition is either

(i) less than Fifty Percent (50%) thereof, during his lifetime, to members of his immediate family who enter into legally binding and effective agreements, satisfactory to Licensor's attorneys, prohibiting further transfer or disposition of such stock or interest and assume all the obligations and restrictions of the License Agreement; or

(ii) upon his death, to any member of Francis J. Esgro's immediate family, by Will or intestacy, who enters into an agreement as above provided in Subparagraph (i); or

(iii) sales in an underwritten "public offering" to not less than three hundred (300) purchasers of stock, but only if and so long as Francis J. Esgro retains not less than Twenty Percent (20%) of the equity ownership of the selling corporation and he continues to be the principal, full time, executive officer.

21. This License Agreement is one of a number of similar agreements entered into simultaneously herewith between White Front Stores, Inc., Licensor, and corporations which are wholly owned subsidiaries of Esgro, Inc., a corporation, Licensee, for the operation of jewelry and camera departments in White Front stores in the State of California, and similar agreements may hereafter be entered into with respect to additional White Front stores in said State of California. It is expressly understood and agreed that, in addition to any other termination provisions contained herein, due to the default of Licensee, this License Agreement shall, at the option of the Licensor, terminate upon the termination of any one or more of such other license agreements, notwithstanding that Licensee may not be in default hereunder.

22. TERMINATION UPON DEFAULT.

Each of Licensee's obligations under this License Agreement is a condition, the time of performances of each is of the essence of this agreement, and the strict performance of each shall be a condition precedent to the right of Licensee to have this agreement continue in effect. In this connection, it is understood and agreed that if Licensee fails to perform any of Licensee's obligations under this agreement, Licensor shall notify Licensee of the nature of Licensee's default, and if it is of such nature as can be cured and is not cured and continues in effect for a period of fifteen (15) days after said notice is given to Licensee (except as otherwise provided in this agreement), then Licensor may terminate forthwith this License Agreement and all rights granted to Licensee hereunder.

23. EXPENSES OF INSTALLATIONS AND IMPROVEMENTS.

Licensee agrees that, as heretofore, all expenses, including but not limited to improvements, installations, fixtures, plumbing and electrical wiring necessary for the operation of said department, shall be borne and paid for by Licensee.

24. LICENSEE TO DEVOTE FULL TIME.

Licensee agrees that Francis J. Esgro, during the term of this agreement or any extension thereof, will devote his full time and efforts to the operation of said jewelry and camera department and that neither the Licensee nor Francis J. Esgro shall have any other interests or business activities, directly or indirectly, which are in whole or in part competitive with those of the Licensor or the Licensee or which require Francis J. Esgro's personal time, services or advice; the foregoing restrictions shall not prevent Francis J. Esgro from operating his wholesale and import business, if said import and wholesale business is, to the extent that it deals directly with consumers or users, limited to typewriters, invoicing machines, adding machines and computers only at one showroom in the Los Angeles area and one showroom in the San Francisco area and does not interfere with or prevent the full performance by him of all of his chief executive duties and services to and for the operation of the licensed department.

25. COLLECTIVE BARGAINING AGREEMENTS.

(a) The parties hereto recognize that there exist current collective bargaining agreements between Licensor on the one hand and Retail Clerks Union Locals 324,

770, 905, 1167 and 1428 on the other hand, hereinafter collectively referred to as the "White Front-Retail Clerks Agreements."

(b) Licensee is familiar with the terms and provisions of said White Front-Retail Clerks Agreements and, to the extent permitted by law, agrees to be bound by the terms and provisions and any amendment or extension of the White Front-Retail Clerks Agreement which covers the White Front employees in the store or stores in which said Licensee operates, and further agrees, to the extent permitted by law, upon request of the Retail Clerks Union local which is party to such White Front-Retail Clerks Agreement, to execute a copy of said Agreement.

(c) Without limiting the generality of the foregoing, Licensee is aware of and accepts the provisions of Appendix C, Section 2 of the White Front-Retail Clerks Agreements which read as follows:

> "Wage rates and commissions for any employees of any leased department included within the bargaining unit covered by this Agreement shall be subject to negotiations between the Union and such leased department, and if the parties to such negotiations are unable to reach agreement within sixty (60) days after the date that this Agreement becomes applicable to the employees of leased department; there shall be no strike, lockout, picketing or cessation of work as between the Union and such leased department, but the Union or the leased department may require submission of the determination of such rates and commissions to arbitration in accordance with the provisions of Article XII, Sections E through J, of this Agreement.

Notwithstanding the provisions of said Sections, the arbitrator shall be expressly empowered to determine said dispute wage rates and commissions. For the purpose of this paragraph a leased department shall be considered a grieving party."

(d) Licensee agrees, to the extent permitted by law, that in the event Licensor shall, during the term hereof, enter into any collective bargaining agreement with a labor organization for employees employed in any store not covered by any of the collective bargaining agreements hereinabove in paragraph (a) referred to covering classifications of work performed by Licensee's employees in such store or stores, the Licensee shall, upon receipt of Licensor's written demand, agree in writing to be bound by the terms and provisions of said collective bargaining agreement or agreements and any amendment or extension thereof.

(e) The provisions of subparagraphs (a), (b), (c) and (d) hereinabove shall be inapplicable to the department of the Licensee in any store where the employees of such Licensee have been or may hereafter be determined by the National Labor Relations Board to constitute a separate bargaining unit until and unless the Retail Clerks local in question is certified as the collective bargaining representative of such employees.

(f) Non-supervisory employees of the Licensee who are not covered by any collective bargaining agreement as in this paragraph provided, shall receive equivalent wages and shall enjoy benefits, hours and working conditions no less favorable than those provided for Licensor's employees in the same store or stores covered by a collective bargaining agreement between Licensor and any labor organization.

(g) Licensee's failure to comply with the provisions of subparagraphs (b), (c) or (d) of this paragraph 25 shall not be deemed a default under this Agreement if Licensee, upon demand by any of the labor organizations referred to in this paragraph for compliance with any of the provisions of said subparagraphs, promptly commences proceedings before the National Labor Relations Board under any applicable provision of the National Labor Relations Act, as amended, to seek determination of the applicability of such provision or provisions of this paragraph to any of Licensee's employees.

26. ATTORNEYS' FEES.

It is agreed that in the event either party brings suit to enforce any of the terms and provisions of this License Agreement, any judgment shall include reasonable attorneys' fees to the successful party. Should Licensor, without fault on Licensor's part, be made a party to any litigation instituted by or against Licensee or instituted against Licensor without joining Licensee arising out of or resulting from any act or transaction of Licensee, Licensee agrees to pay to Licensor the amount of any judgment rendered against Licensor and all costs and expenses, including reasonable attorneys' fees, incurred by Licensor in or in connection with such litigation.

27. SUBJECT TO LEASE.

It is understood and agreed that this License Agreement and each and all of its conditions, provisions and obligations herein contained, shall in every respect be subject to all of the restrictions, limitations and conditions of that certain lease dated ....., between Licensor as lessee and ....., as

lessor, covering the real property described in Exhibit "A" attached hereto of which said department is a part thereof. In the event said lease hereinabove referred to is terminated, then and in that event this License Agreement shall automatically terminate and end as of the date of termination of said lease.

28. NOTICES.

All written notices or demands of any kind which either party may be required or desires to serve on the other under the terms of this agreement may be served, as alternative to personal service, by mailing a copy thereof by certified mail, postage prepaid, addressed to the other as follows:

For service upon Licensor:

White Front Stores, Inc.
5555 East Olympic Boulevard
Los Angeles 22, California
and

Interstate Department Stores, Inc.
111 Eighth Avenue
New York 11, New York

For service upon Licensee:

Mr. Francis J. Esgro
1622 North Highland Avenue
Hollywood 28, California
and

.....
1622 North Highland Avenue
Hollywood 28, California

In case of service by mail, it shall be deemed complete at the expiration of the second day after the date of mailing.

29. GENERAL PROVISIONS

This License Agreement expresses the entire agreement of the parties and there are no warranties, representations or agreements between them except as herein contained. This agreement may not be modified, amended or supplemented except by a writing signed by both Licensor and Licensee. No consent given or waiver made by either party of any breach by the other of any provision of this agreement shall operate or be construed in any manner as a waiver of any subsequent breach of the same or of any other provision. If any portion or provision of this agreement be declared by any court of competent jurisdiction to be invalid, the remaining portions or provisions of this agreement, nevertheless, shall remain in full force and effect. The titles of the various paragraphs hereof are intended solely for convenience of reference and are not intended and shall not be deemed for any purpose whatsoever to modify, extend or place any construction upon any of the provisions of this agreement. As used in this License Agreement, the terms "Licensor" and "Licensee", and all other terms used in the singular number, shall apply when necessary to the plural number. If "Licensee" consists of more than one person, the obligations of "Licensee" shall be the joint and several obligations of such persons. Upon the termination of this License Agreement, Licensee agrees that he will not at any time thereafter, in any way, directly or indirectly, advertise or permit the advertising of merchandise or

otherwise offer the same for sale at any place as "White Front" merchandise or otherwise mention or refer to "White Front."

EXECUTED this .... day of ....., 1963.

WHITE FRONT STORES, INC.

By .....
"LICENSOR"

By .....
"LICENSEE"

NO. 21650

United States
Court of Appeals
for the Ninth Circuit

GEORGE WASHINGTON DURHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

SIDNEY I. LEZAK
United States Attorney,
District of Oregon.

JACK G. COLLINS
First Assistant United States Attorney
506 *U.S. Courthouse, Box* 71
Portland, Oregon 97207
Attorneys for Appellee

GANN PUBLISHING CO., PORTLAND, OREGON 7-20-68

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CASES CITED

STATUTES INVOLVED

NO. 21650

United States
Court of Appeals
for the Ninth Circuit

GEORGE WASHINGTON DURHAM,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C. 3231. This Court has jurisdiction by virtue of 28 U.S.C. 1291. The indictment charges offenses against the laws of the United States.

STATUTES INVOLVED

18 U.S.C. Sec. 474. Plates or stones for counterfeiting obligations or securities.

> "Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone, or other thing, or to suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or
>
> "Whoever has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both."

COUNTER STATEMENT OF THE CASE

On July 12, 1965, Frank Kenney, Special Agent in Charge of the Secret Service, Portland, received a telephone call from the manager of the Metropolitan Branch of the U.S. National Bank of Portland (Tr. 118).[1] The manager reported receipt by the bank in its deposits from an Oregon State liquor store of a possible counterfeit $20 Federal Reserve note (Tr. 119, 124). Kenney went immediately to the bank and determined that the note was counterfeit and called to the attention of the bank's manager a series of numbers written in ink upon the counterfeit note (Tr. 120, 125). Kenney believed that these might be an automobile license number. He immediately inquired of the Oregon State Department of Motor Vehicles and determined that the numbers written upon the Note, 8M5106, were the license number for a 1955 Dodge sedan registered in the name of the defendant at Box 214, Clackamas, Oregon (Tr. 12, Ex. 11).

This counterfeit note was the first of its type received by the Treasury and was assigned a circular identification number "2501" (Tr. 119, 158, 188). It was printed upon Anniversary bond paper (Tr. 198). This particular note and similar ones

[1]As used hereafter R. denotes the record on appeal, Tr. the transcript of proceedings, App. the Appendix of this Brief, and Def. Ex. Defendant's Exhibits at Pre Trial Hearings.

received thereafter were produced by a photo engraving process (Tr. 120, 189). This consists of photographing a genuine note, burning the impression of the photographic negative onto a presensitized aluminum plate by means of a chemical process, printing from the plate onto a rubber blanket and transferring the impression on the blanket onto paper (Tr. 189). The serial number of this note was affixed by a separate printing process (Tr. 189, 192).

On July 19, 1965, Durham was in San Francisco, California. He had taken a "little trip" from Clackamas, Oregon where he then resided (Tr. 132, 138, 221, Ex. 12). Prior to leaving Oregon, his friend, Archie Leo (Tom) Mishler, had asked Durham to buy some good strong paper in San Francisco (Tr. 221). Mishler's address was Route 1, Box 483, Clackamas, Oregon. Mishler gave Durham $50 to $60 for this purpose (Tr. 236).

Durham telephoned the Commercial Paper Company, 300 Brannan, San Francisco, during the morning of July 19, 1965 (Tr. 130, 235). He asked for Anniversary Bond Paper (Tr. 130, 235). He was told that the company carried a comparable sheet called Agawam Bond (Tr. 130). Durham went to the Commercial Paper Company and asked for 100 per cent rag paper (Tr. 130). He ordered " . . . as much as $40 will buy" (Tr. 130). Mr. Synsynuk

wrote up the order for six reams (3,000 sheets, 8 1-2 x 11) of Agawam Bond and received a $50 bill in payment from Durham (Tr. 130).

Two weeks before Durham's appearance in San Francisco a Secret Service Agent had requested personnel of the Commercial Paper Company to obtain the names of everyone buying 100 per cent rag bond whom they did not know (Tr. 134). In the course of writing up Durham's order, Synsynuk excused himself and discussed the sale with his superior, Mr. Hayes (Tr. 131). Hayes became suspicious and directed Synsynuk to require Durham to give an identification (Tr. 132, 138). Hayes then talked to Durham and learned that Durham wanted the paper for a friend in Clackamas, Oregon, who made auto glass prints and was going to use the paper for a technical manual (Tr. 139). Mr. Synsynuk had never heard of anyone putting 100 per cent rag paper in a book (Tr. 135). Hayes reported the incident to the Secret Service in San Francisco who passed the information to Special Agent Kenney in Portland (Tr. 5, 6).

Prior to leaving for San Francisco, Durham knew that Mishler had been convicted of counterfeiting, that Mishler had a shop at the rear of his residence in Clackamas containing all kinds of printing equipment which was used in connection with his business of printing patterns for auto glass (Tr. 237,

238). Upon his return from San Francisco, Durham delivered the six reams of Agawam Bond to Mishler (Tr. 236). This type of paper is readily available in Portland (Tr. 140).

During December 1965, Durham purchased a trailer from John F. Goodwin of Milwaukie, Oregon (Tr. 141), and during February of 1966, Durham went to work as a farm hand at the Orville Killingbeck chicken farm at 7911 S.E. Thiessen Road, Milwaukie, Clackamas County, Oregon (Tr. 143, 144). Durham has taught art classes and done photographic work, being a portrait painter and artist (Tr. 217, 224). He moved his trailer onto the farm and lived alone in the trailer with his dog until the time of his arrest on Thursday, May 5, 1966 (Tr. 145).

As previously mentioned, Special Agent Kenney obtained the first counterfeit $20 Federal Reserve Note of the "2501" type on July 12, 1965. Thereafter, he received an average of around $200 worth of these notes a month until the date of defendant's arrest on May 5, 1966. Thereafter the number of such notes received diminished (Tr. 119, 121).

During the week immediately preceding May 5, 1966, Special Agent Kenney was informed by a confidential informant that during 1964 and 1965 Durham and Mishler had printed up some $20 counterfeit notes (Tr. 11). Durham had been previously sen-

tenced to life imprisonment as a habitual criminal in the Circuit Court of the State of Oregon for Marion County (Ex. 32).

On May 5, 1966, Special Agent Kenney made his affidavit for a search warrant (Def. Ex. 4) before United States Commissioner Louis Stern. Commissioner Stern issued the warrant (Def. Ex. 5) for search of Durham's trailer at the Killingbeck farm, for search of Durham's 1955 Dodge and Durham's person.

Shortly after noon on May 5, 1966, Special Agent Newbrand, together with other agents of the Secret Service went to the Killingbeck farm and learned from Mrs. Killingbeck that her husband and Durham were away on a fishing trip and not expected back until late that day. The Agents kept the farm under surveillance for a portion of that afternoon (Tr. 15-30, 40-42, 180-182).

Durham and Killingbeck returned from their fishing trip between 2:00 and 3:00 p.m. on the afternoon of May 5 (Tr. 210, 227). After unloading his fishing gear, Durham went to a doctor's clinic approximately a mile away for treatment of his thumb (Tr. 228). He waited there about an hour and a half, then went to the Clackamas Post Office and then to dinner at the home of Mrs. Yackley, Tom Mishler's daughter (Tr. 233). Durham then

returned to the Killingbeck farm and discussed farm chores with Mr. Killingbeck at the barn when Secret Service Agents arrived (Tr. 228).

About 7:15 p.m. on May 5, 1966, Special Agents Newbrand, Prouty, and Endicott returned to the farm. Agent Newbrand got out of the car, approached Durham and identified himself as a Special Agent of the United States Secret Service (Tr. 16). Durham responded by saying "Well, that's fine," and then remarked that he was busy and had a chore to do (Tr. 17, 180-183). Newbrand accompanied Durham into the dimly lighted barn and both stepped onto a dumbwaiter type elevator located in the corner of the barn. Durham almost immediately announced that he could put off his chores (Tr. 42). Agent Newbrand further explained the the reason for his visit to the farm nd announced that he had a search warrant for Durham's trailer, automobile and person (Tr. 84). Newbrand warned him of his rights (Tr. 84). Durham then asked Newbrand, "What if I could guarantee to you—I could guarantee to you that counterfeiting in the Portland area would stop?" Newbrand responded that he could make no promises (Tr. 85). Newbrand asked if Durham's trailer was open. Durham stated it was locked and led Newbrand to the Killingbeck farm house where Durham obtained a key hanging on an inside wall. Durham opened the trailer and

then stated, "I am not responsible for anything you find in there." Search of the trailer was then begun by Agents Prouty and Endicott. Agent Newbrand searched Durham and his 1955 Dodge. Durham had no wallet on his person and upon inquiry responded, "I don't have one." (Tr. 87). Agent Prouty almost immediately found a one gallon jar located under an enclosed seat in the trailer containing $19,640 in counterfeit $20 Federal Reserve Notes (Tr. 159) of the "2501" type. This jar also contained an aluminum plate for a counterfeit $5 United States Treasury Note (Tr. 160).

The search of the trailer continued and uncovered a second gallon jar (Ex. 25) containing a wheel of nine discs with digit numbers set to the numerical position of the serial number printed upon the counterfeit $20 notes and covered with hemlock green ink (Tr. 192). In addition, this jar contained blue and red sewing threads similar to colored threads used in genuine currency (Tr. 192). Other items found were a rubber blanket (Ex. 19), photo off-set plates (Ex. 31), red opaque (Ex. 18), a chromium intensifier (Ex. 22) of the type used in treatment of an off-set plate, a Seneca camera (Ex. 26), a Rochester optic camera (Ex. 15), arc lights (Ex. 20), a can of hemlock green ink (Ex. 16), coffee jars containing coffee grounds and some liquid capable of being used as an aging agent for new

currency (Ex. 16, Tr. 190), and other paraphernalia capable of being used in the counterfeiting process.

After discovery of the counterfeit currency and plate in Durham's trailer, Durham was placed under arrest (Tr. 184).

On Friday, May 6, 1966, Special Agent Kenney went to Tom Mishler's house in Clackamas, Oregon and with Mishler's consent conducted a search for further evidence (Tr. 171). While there, Mrs. Yackley, Mishler's daughter, volunteered that on the prior evening, Durham had been at her house and displayed a wallet containing currency (Tr. 170).

On Saturday, May 7, 1966, Special Agent Kenney instructed Agent Newbrand to return to the Orville Killingbeck farm. Agents Newbrand and Prouty returned to the Killingbeck farm about 1:00 p.m. that Saturday and Newbrand inquired of Killingbeck if he had found Durham's wallet (Tr. 185). He said that he had. He said that he had found it on the floor of the barn immediately adjacent to the dumb-waiter elevator (Tr. 185) on the morning of Friday, May 6, 1966. Killingbeck had placed the wallet in a drawer in the farm house and produced it and delivered it to Newbrand. The wallet contained two $20 counterfeit "2501" notes (Exs. 2, 3, Tr. 186-187).

On June 13, 1966, defendant was indicted by a

Federal Grand Jury at Portland, Oregon. The indictment charged defendant in three counts with violations of Title 18 U.S.C. Sec. 474. Count I alleged defendant's unlawful possession of a purported $20 Federal Reserve Note on or about May 5, 1966 at the Killingbeck farm. The counterfeit notes contained in the gallon jar (Exs. 1 and 5), found by Agent Prouty in Durham's trailer during the search of May 5, 1966, were a principal basis of this charge. Count II alleged defendant's unlawful possession during the period May 1 through May 7, 1966 of an additional purported $20 Federal Reserve Note. The two counterfeit notes (Exs. 2 and 3), found in defendant's wallet on May 7, 1966 by Agent Newbrand on his return to the Killingbeck farm formed a principal basis of this charge. Count III alleged defendant's unlawful possession of a plate to be used in counterfeiting a $5 United States Treasury Note. The plate (Ex. 4) found in the gallon Jar (Ex. 5) by Agent Prouty in the course of his search of May 5, 1966 formed a basis of this charge.

Defendant moved to suppress the property seized by the Secret Service Agents in the course of their May 5 search and for suppression of his wallet and its contents obtained by Agent Newbrand from Orville Killingbeck on May 7, 1966. Defendant's motion was heard on June 29, 1966 and continued until July 11, 1966. The Court denied defendant's motion on August

5, 1966 (R. 35). On October 18, 1966, defendant moved for an Order requiring the Government to reveal to defendant the identity of the confidential informant referred to in the Affidavit for Search Warrant (Def. Ex. 4). This motion was heard on October 19, 1966. The Government advised that it did not wish to reveal the name of the informant for fear that physical harm would come to him (Tr. 77, 78). Prior to the commencement of trial on October 20, 1966, the Court interrogated the confidential informant referred to in the search warrant (Tr. 115), and ruled that the Government need not divulge his name for the reason of the danger that might result to him if identified (Tr. 115). (See also sealed exhibit). The Government advised defendant that a Government Agent, Mr. Jack Blue, of the Alcohol and Tobacco Tax Division of the Treasury Department had conducted undercover investigation (Tr. 114). Agent Kenney's report concerning Blue's investigation is set forth at pp. 29, 30 of Appellant's opening brief.

Trial commenced and presentation of evidence was completed by both parties on October 20. The following day the Court dismissed Count III (Tr. 254). The jury found defendant guilty of Counts I and II. Defendant then moved for dismissal as to Count I which was allowed.

On October 26, 1966 Durham was sentenced on Count II to a period of imprisonment of 12 years, with

the provision that he might be eligible for parole at the discretion of the Parole Board.

SUMMARY OF ARGUMENT

I. Defendant's Wallet and Its Contents (Exs. 2, 3, and 6) Were Properly Admitted.

This Court need not consider defendant's claim that his wallet and its contents were in some manner tainted with an alleged illegal search of May 5, 1966. This is because the evidence obtained during the May 5 search did not form the basis of the charge of which defendant was convicted. The evidence from this search did form a principal basis for two charges which were dismissed by the Court. Because of the importance which defendant attaches to this search, the Government will answer his arguments respecting it.

A. The Search of May 5, 1966 was Lawful.

1. The District Court found there was probable cause for issuance of the search warrant. This finding is supported by the facts set forth in the statement of Special Agent Kenney attached to the affidavit for search warrant. These facts show sufficient elements of personal knowledge by Agent Kenney to establish probable cause together with information received from a confidential informant which is confirmed and supported by the facts of Agent Kenney's personal knowledge.

2. The Search Warrant sufficiently describes the property to be seized. Literal identity is not required particularly in the description of counterfeit notes and paraphernalia. The description in the warrant describing the property to be seized as "certain $20 counterfeit Federal Reserve Notes and other counterfeiting paraphernalia . . . " is well within the description approved by the authorities and found sufficient by the District Court.

3. The property which was seized during the search of May 5, 1966 was adequately described in the search warrant. The District Court so found. Each item seized and offered at trial was capable of use in counterfeiting and constituted either contraband or an instrumentality of the crime. Those items seized, but not offered at trial had similar characteristics and are encompassed within the term "counterfeiting paraphernalia." Even if some items seized do not fall within one of the categories of contraband, instrumentalities or fruit of the crime or "mere evidence", their seizure does not require invalidation of the search and suppression of seized property which is described in the warrant.

4. Defendant received a sufficient receipt for the property seized on May 5, 1966. See Def. Exs. 1 and 2. Even if these receipts are not identical with the return filed (Def. Ex. 5), they are suffi-

cient and if not sufficient, defendant's later receipt of a copy of the return as filed would cure any defect.

5. This Court may wish to consider the search of defendant's person on May 5, 1966 as within the standards recently applied for momentary detention and interrogation by police officers under suspicious circumstances. In this event the items seized were obtained incident to a lawful arrest.

B. Defendant's wallet and its contents were obtained on May 7, 1966 as the result of several independent sources of information, including those set forth in Agent Kenney's statement attached to his affidavit for search warrant and his conversation with Mrs. Yackley on May 6, 1966. Defendant, during the May 5 search, did not provide any direction for further investigation. The later discovery of his wallet on May 7, 1966 was too far removed from the search of May 5. It was not a necessary product of that search.

II. The District Court was Correct in Refusing to Strike Exhibit 8.

Defendant's counsel, by his affirmative representation that he had no objection to this evidence and his continued withholding of objection until shortly before instruction of the jury, waived any claim of

error in admission of this evidence. This evidence was relevant and material.

II. The District Court was Correct in Refusing to Require Disclosure of Identity of the Confidential Informant.

Defendant had a full opportunity to examine Agent Kenney regarding the informant and did not pursue it. Defendant's Motion, on the eve of trial, to require disclosure was an afterthought. It was based on mere statements and was not supported by affidavit, authority or other reasons for such disclosure. Notwithstanding this, the District Court interrogated the informant and concluded that the informant could give no information helpful to defendant and that to reveal his identity might result in danger to him. The facts show that the informant did not help to set up the commission of the crime and was not present at its occurrence. Disclosure of his identity was not required.

IV. The District Court was Correct in Denying Defendant's Motions for Judgment of Acquittal at the Close of the Government's Case, at the Close of all Evidence, and in the Alternative for a New Trial After the Jury's Verdict.

There was substantial evidence to support the

Court's rulings upon defendant's motions and to support the jury's verdict.

ARGUMENT

I

1. The District Court Was Correct in Admitting Defendant's Wallet and its Contents.

This Court need not consider the merit of defendant's claim that the District Court erred in refusing to exclude evidence seized under a search warrant on May 5, 1966 (Assignment of Error No. 1). See *Cotton* v. *U.S.*, 371 F.2d 385, 391 (C.A. 9, 1967). Defendant was convicted only of the charge set forth in Count II of the Indictment. The substantial evidence supporting this conviction will be discussed in a later section of this brief. The items of real evidence which constitute a principal basis for the charge in Count II are two $20 counterfeit Federal Reserve Notes found in defendant's wallet on May 7, 1966 and the wallet itself (Exs. 2, 3, and 6). The real evidence obtained during the search of May 5, constitutes a basis for the charges set forth in Counts I and III of the Indictment. Counts I and III were dismised by the Court (Tr. 282 and 254).

Count I was based in part upon counterfeit $20 Federal Reserve Notes found in a gallon jar during the course of the May 5 search (Exs. 1 and 5). The Court

dismissed Count I following the jury's verdict of guilty because the back plate number (946) set forth in the Indictment differed from the back plate number. (930) on Exhibit 1 (Tr. 282). Exhibit 5, the gallon jar, contained $19,640 in counterfeit $20 Federal Reserve Notes which were identical except that some notes had a back plate number of 946 and others 930.

Count III was based in part upon a counterfeit plate (Ex. 4) for a $5 United States Treasury Note also found in the same gallon jar (Ex. 5). Count III was dismissed by the Court prior to its instruction of the jury because, in the opinion of the Court, the plate was not similar ". . . to the big plates used by the Bureau of Engraving in Washington, D.C." (Tr. 254).

Defendant asserts that this Court must nonetheless consider the character of the May 5 search because of two facts which Agent Newbrand learned during the course of his search of defendant's person on that date. These are the absence at the time of search of any wallet on defendant's person and defendant's statement that he did not have a wallet (Tr. 24, 25). These facts were not offered at trial.

Defendant claims the search of Thursday, May 5, 1966 was illegal and that this illegality in some manner taints the voluntary delivery by Orville Killingbeck of defendant's wallet and its contents to Agent Newbrand on Saturday, May 7, 1966 (Exs. 2, 3 and

6). This purported taint is alleged to occur by virtue of information independently obtained by Agent Kenney from Mrs. Yackley on Friday, May 6, 1966, to the effect that defendant had displayed his wallet at dinner on the previous evening prior to the search of May 5.

The evidence obtained during the May 5 search was not used against defendant in connection with the charge of which he was convicted. This Court need not consider the character of the May 5 search. Because of the significance which defendant attaches to this search, however, the Governmnt will answer defendant's arguments in support of his Assignment of Error No. 1.

A. The May 5 Search Was Lawful

1. The Search Warrant and Supporting Affidavit Show Probable Cause.

The District Court found there was probable cause for the issuance of a search warrant on May 5, 1966 by Commissioner Louis Stern (R. 34).

The relevant inquiry in determining the existence of probable cause to support the issuance of a search warrant is whether there is a substantial basis for the Commissioner to conclude that a crime is being committed—here the unlawful possession of counter-

feit securities of the United States. See *Jones* v. *U.S.*, 362 U.S. 257, 271 (1960); *Rugendorf* v. *U.S.*, 376 U.S. 528, 533 (1964). Whether or not a "substantial basis" was present is a question of fact as to which the Commissioner's determination, supported by the presumption of regularity attaching thereto, will ordinarily be accepted. *Irby* v. *U.S.*, 314 F.2d 251, 253 (C.A.D.C., 1963); cert. den. 374 U.S 842 (1963) The burden is on the movant to show that the issuance of the warrant was an abuse of discretion. *Irby* v. *U.S.*, supra, at 258. Where the issue of probable cause is determined by a Commissioner, rather than a police officer, a reviewing court will accept evidence of a less judicially competent or persuasive character than would have justified an officer acting in his own without a warrant. *Jones* v. *U.S.*, 362 U.S. 257, 270 (1960); *Aguilar* v. *Texas*, 378 U.S. 108 (1964). Probable cause is the same thing as reasonable grounds. *Stacey* v. *Emery*, 97 U.S. 642 (1878); see also *Locke* v *U.S.* 7 Cranch 339, 348 (11 U.S., 1813, Marshall, C.J.) describing probable cause as "suspicion".

The existence of probable cause may be shown in any one of three ways: (1) direct observation by the affiant; (2) hearsay statements " . . . so long as a substantial basis for crediting the hearsay is presented." *Jones* v. *U.S.*, 362 U.S. 257, 269 (1960); or (3) a combination of both. See *Walker* v. *U.S.*,

327 F.2d 597 (C.A.D.C., 1963), cert. den. 377 U.S. 956 (1964)

Agent Kenney's statement attached to his affidavit for search warrant (Def. Ex. 4) sets forth information obtained by his direct observation and of his personal knowledge sufficient to establish probable cause. Agent Kenney recites his receipt of the $20 counterfeit note (Ex. 1) having the notation "8M5106" from a branch of the United States National Bank. He further recites the assignment of that number as a license number to defendant for a 1955 Dodge sedan at an address of Box 214, Clackamas, Oregon. The Government respectfully submits this information alone would constitute probable cause (see Tr. 60). Agent Kenney knew that Tom Mishler, Dunham's associate, had been convicted of counterfeiting in 1956. *U.S.* v. *Mishler,* Criminal No. 18181, USDC Oregon, 1956. This is a matter of public record. As such, Agent Kenney's statement regarding Mishler's offense may reasonably be read as asserting knowledge gained from such sources. *Smith* v. *U.S.,* 321 F.2d 427 (C.A. 9, 1963). *Smith* also held that if such allegations " . . . are construed as not referring to any personal knowledge of the affiant, the documentary nature of the facts about which the affiant was informed constitutes the requisite substantial basis for crediting the information under *Jones* and assures the essential

independent determination by the magistrate of the probability that a law was violated on the premises the search of which was requested." *Smith* v. *U.S.*, 321 F.2d 427, 430 (C.A. 9, 1963). Agent Kenny's statement also contains information of his personal knowledge of defendant's purchase of a trailer from a local finance company, its location and defendant's residence and employment.

Durham's attempted purchase of the particular kind of paper used in printing the "2501" notes and his actual purchase of Agawam bond paper in San Francisco on July 19, 1965, was reported to Agent Kenney by agents of the Secret Service in San Francisco. Durham's close relationship with Tom Mishler was reported to Kenney by Agent Jack Blue, of the Alcohol and Tobacco Tax Division, United States Treasury (Tr. 114-117, see Appellant's brief, p. 29). Information communicated in the course of official business between agents of an in-investigative bureau is not to be excluded by the hearsay rule. *Chin Kay* v. *U.S.*, 311 F.2d 317, 320 (C.A. 9, 1963); *Weise* v. *U.S.*, 251 F.2d 867, 868 (C.A. 9, 1958); cert. den. 357 U.S. 936 (1958); see also *U.S.* v. *McCormick*, 309 F.2d 367 (C.A. 7, 1962); *U.S.* v. *Bianco*, 189 F.2d 716, 719 (C.A. 3, 1951). "Observations of fellow officers of the Government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of

their number." *U.S.* v. *Ventresca*, 380 U.S. 102, 111 (1964). The government respectfully submits that a showing of personal knowledge of Agent Kenney and the extent of such knowledge is manifest from a reading of his statement attached to the affidavit.

The facts set forth in Agent Kenney's statement give additional creditibility to the report of the confidential informant and serve as a substantial basis for crediting the information furnished by that informant. See *Draper* v. *U.S.*, 358 U.S. 307, 313 (1958); *Rugendorf* v. *U.S.*, 376 U.S. 528, 533 (1964); *Travis* v. *U.S.*, 362 F.2d 477, 480 (C.A. 9, 1966). The search warrant itself (Def. Ex. 5) refers to a single confidential informant. Agent Kenney's confusion under trying personal circumstances (Tr. 2) between the confidential inquiry or investigation referred to in paragraph 4 of his statement and the confidential informant referred to in paragraph 5 was later corrected (Tr. 114). Kenney's report regarding the investigation of Jack Blue is set out at pages 29 and 30 of Appellant's opening brief. Contrary to appellant's claim (See Appellant's brief, p. 30), this report indicates defendant's presence and assistance to Tom Mishler in Mishler's printing business.

Even though certain portions of an affidavit for a search warrant contain material that is not admissible as a basis for the issuance of a warrant,

this will not invalidate a warrant if the affidavit contains other essential allegations sufficient to establish probable cause. *Chin Kay* v. *U.S.*, 311 F.2d 317, 321 (C.A. 9, 1963). Thus, even if the recital of the confidential informant's accusations set forth in paragraph 5 of Agent Kenney's statement is not admissible as a basis upon which to consider the sufficiency of the affidavit, which is not for a moment admitted, the other information contained in the affidavit is more than sufficient to warrant a man of reasonable caution in the belief that an offense has been committed and that probable cause exists for the issuance of a warrant. *Carroll* v. *U.S.*, 267 U.S. 132 (1924); *Brinegar* v. *U.S.*, 338 U.S. 160 (1948).

In the instant case, officers prudently and with due regard for the rights of defendant obtained a search warrant, and served it upon him prior to commencing their search. Where, as here, the circumstances for obtaining the warrant are detailed and constitute reasons for crediting the source of additional niformation from a confidential informant and where the magistrate has found probable cause, the Court should not invalidate a warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. See *U.S.* v. *Ventresca*, 380 U.S. 102, 109 (1964). There was probable cause for issuance of a warrant.

2. The Search Warrant Sufficiently Describes the Property to be Seized.

The search warrant (Def. Ex. 5) describes the property to be seized as "certain $20 counterfeit Federal Reserve Notes and other counterfeiting paraphernalia which are alleged by the affidavit of Frank J. Kenney, Special Agent in Charge of the Secret Service, to be at said premisis." Literal identity is not required. See *U.S.* v. *Fitzmaurice,* 45 F.2d 133 (C.C.A. 1, 1930). The description of counterfeit notes and counterfeit paraphernalia need not be so precise as that required in other instances, e.g. stolen goods. See *Nuckols* v. *U.S.,* 99 F.2d 353 (C.C.A.D.C. 1938), cert. den. 305 US 626 (1935) See also *US.* v. *Joseph,* 174 F.Supp. 539 (D.C.Pa., 1959), affirmed 278 F2d 504 (C.A. 3, 1960), cert. den. 364 U.S. 832 (1960).

The description in the search warrant is further supplemented by the statement of Frank J. Kenney attached to the affidavit for search warrant (Def. Ex. 4). This statement describes the $20 counterfeit Federal Reserve Note with further specificity. See *U.S.* v. *Howell,* 240 F.2d 149 (C.A. 3, 1956).

The Government respectfully submits the description is sufficient. The District Court so held (R. 33). See *Steele* v. *U.S.,* 267 U.S. 498, 503-504 (1925) "Cases of whiskey", held sufficiently specific; *U.S.* v. *Ed-*

wards, 296 Fed. 512, 515 (D.C.Mich., 1924) "Whiskey and certain other intoxicating liquors, the exact kind and quantity being at the time to affiant unknown", held sufficient; *U.S.* v. *Joseph,* 174 F. Supp. 539, 544 D.C.(Pa., 1959) "Betting slips, run-down sheets, records and other paraphernalia and equipment which were being used or intended for use" held sufficient; see also *Calo* v. *U.S.,* 338 F.2d 793 (C.A. 1, 1964).

3. The Property Seized Was Described in the Search Warrant.

Defendant objects that the description of the property to be seized under the search warrant, namely, "certain $20 counterfeit Federal Reserve Notes and other counterfeiting paraphernalia" does not encompass the items of property listed upon the return. The District Court held to the contrary (R. 34). Each item seized and offered at trial was capable of use in counterfeiting (Tr. 160, 161, 189-199) and constituted either contraband or an instrumentality of the crime charged. Those items not offered at trial had similar characteristics. All items seized are encompassed within the term "counterfeiting paraphernalia."

Assuming, *arguendo,* that some items seized are neither contraband instrumentalities, nor fruit of the crime, their seizure may nonetheless be proper

if they bear a reasonable relation to the search. *Johnson* v. *U.S.*, 293 F.2d 539 (C.A.D.C., 1961); *Woo Lai Chun* v. *U.S.*, 274 F.2d 708 (CA 9, 1960); *Bryant* v *U.S.*, 252 F.2d 746 (C.A. 5, 1958); *U.S.* v. *Joseph,* 174 F. Supp. 539, 545 (D.C. Pa., 1959), affirmed 278 F.2d 504 (C.A. 3, 1960), cert. den. 364 U.S. 828 (1960); *U.S.* v. *Donovan,* 251 F. Supp. 477 (D.C.S.D. Ohio W.D, 1966) Seizure of such items may also be proper as "mere evidence" obtained incident to a lawful arrest See *Warden, Maryland Penitentiary* v. *Hayden,* —— U.S. —— (May 29, 1967). Finally, seizure of property not described in a warrant will not invalidate or require suppression of seized property which is described in the warrant. The remedy is suppression of those items not described. The validity of the warrant is judged not on the basis of what may be found in the future. *U.S.* v. *Malugin,* 200 F. Supp. 764, 766 (D.C.M.D. Tenn., 1961); *U.S.* v. *Doe,* 19 F.R.D. 1, 4 (D.C.E.D. Tenn, 1956)

4. Defendant Received a Sufficient Receipt.

Defendant objects that the search of May 5, 1966 was illegally executed. Defendant claims he was not given a sufficient receipt for the property seized. The District Court found to the contrary (R. 34). At the time of the search defendant received a copy of the search warrant (Def. Ex. 1, Tr. 20-21). Defendant also received a receipt for contraband (Def.

Ex. 2, Tr. 22-23). The receipt for contraband was given to Durham by Agent Newbrand following Durham's loss of his copy of the search warrant (Tr. 46). During the hearing on defendant's motion to suppress on July 11, 1966, defendant stipulated that he had then received a copy of the return of the search warrant as filed (Tr. 73, Def. Ex. 5). The copy of return and receipt (Def. Exs. 1 and 2) are not identical with the return as filed with the Court (Def. Ex. 5). They show, however, a substantial compliance. Under the circumstances, the Government respectfully submits they are sufficient. Since the act of leaving a receipt is ministerial, the failure to leave a receipt or a sufficient receipt would not render the search invalid. *McGuire* v. *U.S.*, 273 U.S. 95, 97 (1927); *Giacolone* v. *U.S.*, 13 F.2d 108, 109 (C.C.A. 9, 1926); and cases cited in *U.S.* v. *Gross*, 137 F Supp. 244, 248 (D.C.S.D.NY, 1956, note 11) Defendant's later receipt of a copy of the return as filed would cure any possible defect (Tr. 73).

5. A Reasonable Search Incident to Arrest.

The search of defendant's person on May 5, 1966 meets standards recently applied for momentary detention and interrogation by police officers under suspicious circumstances prior to arrest. *Cotton* v. *U.S.*, 371 F.2d 385, 392 (C.A. 9, 1967); *Gilbert* v. *U.S.*, 366 F.2d 923, 928 (C.A. 9, 1966); *Wilson* v.

Porter, 361 F.2d 412 (C.A. 9, 1966); *Lipton* v. *U.S,* 348 F.2d 591 (C.A. 9, 1965).

Defendant presented Agent Newbrand with a set of highly suspicious circumstances. Agent Newbrand was acquainted with the information contained in the statement of Agent Kenney (Def. Ex. 4) prior to the search of defendant's person. Defendant's action in immediately going into the barn to do a routine "chore" after Newbrand's identification of himself as an agent of the Secret Service, followed by a hasty departure from a point in the barn where his wallet was found the next morning, could only be considered as unusual (Tr. 16-20, 23-25, 41-43). His additional statements inquiring if he could not make a deal with Agent Newbrand and that he was not responsible for anything found in his trailer could only heighten suspicion. Agent Prouty's discovery of counterfeit currency in defendant's trailer completed an extremely suspicious pattern and constituted probable cause for defendant's arrest. A search of defendant's person at this point was not an unreasonable search within the requirements of the Fourth Amendment. The search of defendant's person on May 5, 1966 was lawful, even in the absence of a search warrant.

B. ORVILLE KILLINGBECK'S VOLUNTARY DELIVERY OF DEFENDANT'S WALLET AND ITS CONTENTS ON MAY 7, 1966, WAS THE RESULT OF SEVERAL INDEPENDENT SOURCES OF INFORMATION. IT WAS TOO FAR REMOVED FROM THE SEARCH OF MAY 5. THIS EVIDENCE WAS NOT A NECESSARY PRODUCT OF THE MAY 5 SEARCH. ITS ADMISSION WAS PROPER.

Defendant's wallet and contents including two "2501" counterfeit $20 Federal Reserve Notes were admitted in evidence at trial (Tr. 187). Defendant assigns this as error (Assignment of Error No. 2).

During the May 5 search, defendant, although without his wallet, did not direct or otherwise suggest to Agent Newbrand where it might be. He said, "I don't have one." (Tr. 24-25). Defendant gave no direction as was done *in Wong Sun* v. *U.S.*, 371 U.S. 471 (1962). Defendant presented the Secret Service with a blank wall. Assuming, *arguendo,* that this search of May 5 was in some manner illegal, Appellant cites no case in which such an absence of evidence or direction has resulted in suppression of evidence subsequently found. The reason may be as follows:

Negative information fails to provide a direction for further investigation. If progress is to be made, other independent sources of information must be found. This was so in the instant case. Agent Kenney's investigation at the Mishler home on May 6,

including his conversation with Mishler's daughter, Mrs. Yackley, was based upon sources of information independent of the May 5 search, e.g., defendant's close association with Mishler in Mishler's printing business at Clackamas, Oregon (Tr. 7, 70-71), Mishler's prior record of counterfeiting (Tr. 70-71), and investigation by Jack Blue (Tr. 27, see Appellant's Brief, p. 29). These independent sources and others set forth in Agent Kenney's affidavit for search warrant (Def. Ex. 4) existed prior to May 5, 1966.

On May 6, Mishler's daughter, Mrs. Yackley, volunteered the information that on the prior day at dinner defendant had displayed a wallet and currency. This information cannot be said to be derived in any way from the search of May 5. Mrs. Yackley's Statement was an additional independent source which, together with others, resulted in Agent Newbrand's return to the Killingbeck farm on May 7 and his inquiry of Orville Killingbeck as to whether he had found defendant's wallet (Tr. 53). Defendant's reliance upon Mrs. Yackley's statement emphasizes its character as an independent source (see Appellant's Brief, p. 42).

There is nothing in the record to suggest that these independent sources did not result in the later discovery of defendant's wallet. See *Cotton* v. *U.S.*,

371 F.2d 385, 394 (C.A. 9, 1967). On the contrary, the record indicates these independent sources did in fact result in this discovery (Tr. 70-71). To suppress the wallet and its contents as the fruit of a poisonous tree would in effect immunize defendant from the use against him of all subsequently obtained evidence concerning the wallet and its contents no matter how properly obtained from independent sources. See *U.S.* v. *Avila*, 227 F. Supp. 3, 8 (D.C.N.D. Cal. SD, 1963). The "independent source" referred to in *Silverthorn Lumber Co* v. *U.S.*, 251 U.S. 385 (1919) is present in the instant case.

The attentuation referred to in *Nardone* v. *U.S.*, 308 U.S. 338 (1939) and *Wong Sun* v. *U.S.*, 371 U.S. 471 (1962) is also present. In *Wong Sun*, agents proceeded "immediately" from Toy's home to Yee's house. Two days elapsed in the instant case between Durham's statement that he had no wallet and its later delivery by Orville Killingbeck. This passage of time permitted operation of the numerous independent sources of information.

The District Court did not err in refusing to exclude defendant's wallet and its contents obtained on May 7, 1966, from Orville Killingbeck (Exs. 2, 3, and 6).

II

The District Court Was Correct in Refusing to Strike Exhibit 8.

A. The District Court Did Not Abuse its Discretion in Finding that Defendant's Objection Came Too Late.

Government Exhibit 8 was offered and admitted without objection, during the afternoon session of October 20, 1966. Before admitting this exhibit, the Court asked defendant's counsel if he had any objection. Defendant's counsel replied, "No, your Honor" (Tr. 188). On the following morning, immediately before argument and instruction of the jury, defendant's counsel for the first time objected to Exhibit 8 and moved to exclude it (Tr. 248-250). The District Court denied defendant's motion on the ground, among others, that it came too late (Tr. 250-251). This ruling is assigned as error (Assignment of Error No. 3).

A general and salutary rule is that objection to the admissibility of evidence should be made at the time it is offered. *Fuller* v. *U.S.*, 288 F. 442, 445 (C.C.A.D.C., 1923); *Scott* v *U.S*, 317 F2d 908 (C.A.D.C., 1963). Failure to make timely and proper objection to the admission of evidence constitutes a waiver of the right to object and ordinarily cures any defect or error in its admission. *Sandoval* v.

U.S., 285 F.2d 605, 606 (C.A. 10, 1960); *Moreland* v. *U.S.*, 270 F.2d 887, 890 (C.A. 10, 1959).

It is within the discretion of the trial judge to sustain or overrule an objection by a defendant delayed until the end of the Government's case. The scope of such discretion becomes broader when objection is delayed until the end of trial and then seeks to strike from the jury's consideration evidence previously received without objection. *Lambert* v. *U.S.*, 26 F.2d 773, 774 (C.C.A. 9, 1928); *Metcalf* v. *U.S.*, 195 F.2d 213, 216 (C.A. 6, 1952).

Defendant's counsel made no objection to Exhibit 8 at the time various witnesses identified Government Exhibit 8. On the contrary, defendant's counsel cross examined such witnesses (Tr. 123, 125, 127). Counsel should not be permitted to sit idly by where witnesses testify to certain evidence and then finding it not to his liking, move to strike it. Counsel should also not be permitted to make an affirmative representation that he has no objection to certain evidence and then finding it not to his liking, move to strike it. See *U.S.* v. *Parnes*, et al., 210 F.2d 141, 143 (C.A. 2, 1934); *Isaacs* v. *U.S.*, 301 F.2d 706, 734 (CA 8, 1962) Appellant does not contend that the admission of Exhibit 8 constitutes plain error affecting substantial rights within the meaning of Rule 52(b) F.R.Crim.P. Such a contention would not have merit for the reason that no such error occurred.

B. Exhibit 8 Was Properly Admitted.

Exhibit 8 was similar to counterfeit notes found in defendant's wallet (Exs. 2 and 3) and his trailer (Ex. 5). Exhibit 8 was the first of a series of similar notes received by the Secret Service at the rate of about $200 per month from July 12, 1965 to the date of defendant's arrest, May 5, 1966. After defendant's arrest, receipt of these notes diminished (Tr. 121).

Intent may be proved by circumstantial evidence. It rarely can be established by other means (Tr. 266). One such circumstance was the passing of a large number of similar counterfeit notes prior to defendant's arrest followed by a decrease in the circulation of such notes after his arrest. From such evidence a jury might reasonably infer that defendant was connected with the passing of such notes, and that because of this connection he had an intent to sell or otherwise use the notes found in his wallet (Exs. 2 and 3) and in his trailer (Ex. 5). Exhibit 8, as one of these notes, was thus relevant and material to proof of an element of each offense charged.

Defendant has never objected to Agent Kenney's evidence of a decrease in the circulation of such notes following defendant's arrest. Defendant should then have no complaint when one of such notes is

received in evidence. Particularly so when Exhibit 8 was the first of this series.

Exhibit 8 and the testimony surrounding it prompted the Secret Service to act. It was this event which caused agents of the Secret Service to commence an investigation and to direct their attention toward defendant. It is similar to any police officer's narrative of the events which initially attracted his attention and brought him to the scene of the crime —in this case the later search of defendant's trailer and person on May 5, 1966 and delivery of his wallet and its contents on May 7, 1966. As such it was relevant and material. See *Lipton* v. *U.S.*, 348 F.2d 591, 592 (C.A. 9, 1965); *Wilson* v. *Porter,* 361 F.2d 412, 414 (C.A. 9, 1966); *Rogers* v. *U.S.*, 362 F.2d 348, 360 (C.A. 8, 1966); *U.S.* v. *Berry,* 369 F.2d 386, 387 (C.A. 3, 1966); *Jefferson* v. *U.S,* 349 F.2d 714, 715 (C.A.D.C., 1965).

The old rule that an inference may not be based upon an inference has been repudiated. *DeVore, et al.* v. *U.S.*, 368 F.2d 396, 399 (C.A. 9, 1966); *Toliver* v. *U.S.*, 224 F2d 742, 745 (C.A 9, 1955) Rather, the question is merely whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that defendant is guilty beyond a reasonable doubt. *Dirring* v. *U.S.*, 328 F.2d 512, 515 (C.A. 1, 1964).

In the instant case Exhibit 8, when viewed as part of the totality of the facts, is part of the fabric of events which shed light on the issues involved by affording grounds for reasonable inferences by the jury. See *Stauffer* v. *McCrory Stores Corp.*, 155 F. Supp. 710 (D.C. W.D.Pa., 1957).

Many times it is difficult to determine the logical relevance of a particular piece of evidence. The difference between abstract logical relevance and legal relevance cannot always be set out in clear cut terms. *U.S.* v. *Costello,* 221 F.2d 668, 677 (C.A. 2, 1955), affirmed 350 U.S. 359 (1956). In such situations, the law invests the trial Court with wide latitude of action. A trial court's determination of legal relevancy must be considered an act of discretion not to be disturbed absent a clear showing of abuse. See *Cotton* v. *U.S.*, 361 F.2d 673, 676 (C.A. 8, 1966). In the instant case, Exhibit 8 was the fact which started an investigation which led to search of defendant's trailer. Exhibit 8 alerted Government agents to the presence of a new "2501" type note of which numerous examples were received in Oregon prior to the seizure of similar notes in defendant's trailer on May 5, 1966. The decrease in circulation of such notes following defendant's arrest and the discovery of similar notes in his wallet on May 7, 1966 are part of the warp and woof of the crimes charged in the Indictment.

Defendant does not claim that the admission of Exhibit 8 constitutes plain error within the ambit of Rule 52(b) F.R. Crim. P. Such a claim would not be appropriate, because no substantial rights of defendant were affected. Defendant's counsel apparently did not think so at the time the evidence was offered when he stated he had no objection. See *Reid* v. *U.S.*, 334 F.2d 915, 918 (C.A. 9, 1965).

The evidence of defendant's guilt was overwhelming. The jury could only have concluded he was guilty. See *Bushaw* v. *U.S.*, 353 F.2d 477, 481 (C.A. 9, 1965). The admission of Exhibit 8 was proper.

III

THE DISTRICT COURT WAS CORRECT IN REFUSING TO REQUIRE DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT.

Two days prior to trial defendant moved to require disclosure of the name of the confidential informant. It was an afterthought. Defendant's counsel asked for the informant's name several months before during the June 29, 1966 hearing on defendant's motion to suppress (Tr. 9). He did not pursue the inquiry.

Defendant's motion was heard on October 19, 1966, the day preceding trial. Defendant sought the names of two confidential informants. There was only one (Tr. 114). Agent Kenney's inclusion of the confidential inquiry of Agent Jack Blue as a confidential source has already been discussed. The Government respectfully declined to volunteer the name of the confidential informant for fear of physical harm to him (Tr. 9, 77, 79, 115, 252). On the morning of trial, October 20, 1966, the Court denied defendant's motion. The Court advised defendant that it had interrogated the confidential informant and concluded that the informant could give no information helpful to the defendant and that the Government should not be required to reveal his name " . . . because of the danger to him that may result if his name is identified and becomes known" (Tr. 115). (See

sealed exhibit). This ruling is assigned as error (Assignment of Error No. 6).

The informer's privilege was early recognized in *In re Quarles and Butler,* 158 U.S. 532, 535-536 (1894). *Rovario* v. *U.S.,* 353 U.S. 53, 60-61 (1956) created an exception where the name of the informer is relevant and helpful to the defense or is essential to a determination of the cause. The facts of *Rovario* limit this exception to cases in which the informer helped to set up the commission of the crime and was present at its occurrence. See *Jones* v. *U.S.,* 271 F.2d 494, 496 fn. 3 (C.A.D.C., 1959), cert. den 362 US. 918 (1959); *U.S.* v *Rugendorf,* 316 F.2d 589, 592 (C.A. 7, 1963), affirmed 376 U.S. 528 (1963).

There is no absolute rule requiring disclosure of an informer's identity. *McCray* v. *Illinois,* 386 U.S. 300, 311, 312 (1967). Defendant had a full pre-trial oportunity to examine Agent Kenney regarding the informant (Tr. 9). He did not pursue it. On the eve of trial defendant moved, without supporting affidavits or citation of authority, to require disclosure of the name of the informant (R. 37). Defendant stated in his motion that such disclosure was " . . . essential to a fair determination of the cause at trial and defendant cannot adequately defend himself at trial on the merits without this information" (R. 37). Without more the District Court might

properly have denied Defendant's motion. Instead, the District Court interrogated the informant. (See sealed exhibit). The Court concluded that the informant could give no information helpful to defendant (Tr. 115).

Defendant's statements do not bring the instant case within the exception of *Rovario*. (See R. 37 and Appellant's opening brief, p. 53). There is nowhere even a suggestion that the informant helped to set up the commission of the crime and was present at its occurrence. This Court is respectfully referred to the sealed exhibit for the facts. In attempting to bring the fact of the instant case within the *Rovario* exception, defendant follows a procedure employed unsuccessfully in *Rugendorf* v. *U.S.*, 376 U.S. 528, 534 (1963).

The importance of informers has been recently recognized. *Lewis* v. *U.S.*, 385 U.S. 206 (1966). So has their protection. *McCray* v. *Illinois*, 386 U.S. 300 (1967). On the record which defendant presents to this Court, he asks for a rule virtually prohibiting the use of informers. The District Court did not err in refusing to require the Government to disclose the identity of the confidential informant.

IV

THE DISTRICT COURT WAS CORRECT IN DENYING DEFENDANT'S MOTIONS FOR JUDGEMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE, AT THE CLOSE OF ALL EVIDENCE, AND IN THE ALTERNATIVE FOR A NEW TRIAL, AFTER THE JURY'S VERDICT.

Defendant assigns as error the District Court's denial of his Motions for judgement of acquittal at the close of the Government's case (Assignment of Error No. 4), at the close of all the evidence (Assignment of Error 5), and for acquittal and in the alternative for a new trial after the jury's verdict (Assignment of Error No. 7).

Defendant argues there is insufficient evidence to support these rulings. In judging the sufficiency of the evidence, all conflicts are to be resolved against defendant and the evidence, including reasonable inferences therefrom, and viewed in the light most favorable to the Government. *Glasser* v. *U.S.*, 315 U.S. 60, 80 (1941).

Defendant complains that the Government presented insufficient evidence that defendant had counterfeit notes in his possession with intent to sell or use them. The Government's evidence showed that defendant's wallet was found the morning after his arrest, that it remained in the same condition as found until delivered to Agent Newbrand, and at the time of this delivery it contained two $20

counterfeit notes of the type described in the Indictment (Exs. 2 and 3). (Tr. 146-151, 185-187). The Government's evidence also showed that the wallet was found by Orville Killingbeck on Friday morning, May 6, at a dimly lighted point in his barn where defendant had led Agent Newbrand on the previous evening (Tr. 181-182). Defendant's entrance into the barn immediately followed by Agent Newbrand's introduction of himself as a Secret Service Agent, coupled with defendant's hasty departure from a point in the barn where his wallet was found the next morning, would have permitted the Court and jury to infer defendant's trip to the barn was a pretext to dispose of his wallet which he knew contained counterfeit money which he had intended to use. This evidence is further supported by that of defendant's trip to San Francisco, his request there for a type of paper used in printing the counterfeit notes (Exs. 2 and 3), and his purchase of six reams of similar paper for a friend who was to use it for an unusual purpose. Such paper is readily available in Portland. Finally, there is the additional fact that following defendant's arrest the number of counterfeit notes in circulation of the type found in defendant's wallet diminished (Tr. 121). There was additional evidence of defendant's artistic and photographic ability, together with his close association with a known counterfeiter who possessed printing equipment.

Defendant complains there is no evidence that the $20 counterfeit notes (Exs. 2 and 3) were in his wallet when last seen on his person at Mrs.Yackley's on the evening of his arrest. Such evidence is not required. There is substantial evidence supporting the various rulings of the Court prior to and following the jury's verdict.

CONCLUSION

Defendant had a fair trial. There was substantial evidence to support the Court's rulings which are assigned as error and the jury's verdict of guilty upon Count II of the Indictment. Defendant's assignments of error are not well taken. The District Court's judgment based upon the jury's verdict of guilty upon Count II should be affirmed.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

JACK G. COLLINS
First Assistant United States Attorney
Of Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Date 24th day of July, 1967

JACK G. COLLINS
First Assistant United States Attorney

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Commissioner's Docket No. CH6-105

UNITED STATES OF AMERICA

v. **SEARCH WARRANT**

GEORGE W. DURHAM,
Defendant.

To United States Marshal or any authorized officer.

Affidavit having been made before me by Frank J. Kenney, Special Agent in Charge of Secret Service that he has reason to believe that on the person of George W. Durham and on the premises known as Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, and more particularly in a 1959 Traveler trailer, white color, and in a 1955 Dodge Sedan, Oregon License 8M-5106 located at said premises in the District of Oregon there is now being concealed certain property, namely, certain twenty dollar counterfeit federal reserve notes and other counterfeiting paraphernalia which are alleged by the Affidavit of Frank J. Kenney, Special Agent in Charge of Secret Service, to be at said premises based upon the personal knowledge of Mr. Kenney uncovered in an official investigation and also information received from a confidential informant, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person and premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the person and place named for the property specified,

serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 5th day of May, 1966

-s- Louis Stern,
LOUIS STERN
U.S. Commissioner.

RETURN

I received the attached search warrant May 5, 1966 and have executed it as follows:

On May 5, 1966 at 7:59 o'clock p.m., I searched (the person) described in the warrant and (the premises)

I left a copy of the warrant with George W. Durham together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Approximately 16 packges of Cft. Notes in a 1 gallon jar; also n unknown number of photographic negatives of United States Currency.

1 (one) gallon jar containing miscellaneous articles used in the manufacture of counterfeit currency.
1 (one) Photoscope-projector, model B.
1 (one) Davidson Star D tripod
1 (one) box 3M photo offset plates.
1 (one) Seneca Camera.
2 (two) General Electric Arc Lamps.
1 (one) can of offset Hemlock Green ink.
2 (two) Twelve ounce jars of Butternut Coffee.
1 (one) Ten ounce jar of Chase & Sanborn Coffee.
1 (one) jar of Craftint negative opaque.
1 (one) Cal Ink .066 gague blanket.
4 (four) cut film holders.
1 Camera Manufactured by Rochester Optical Company with accessories.
1 (one) Selsi Magnifying Glass.
1 (one) package of Kodak Chromium intensifier.
2 (two) packages of Anesco Copper intensifier.
1 (one) book 11 x 14 of unsed paper.
1 (one) twelve inch ruler.

This inventory was made in the presence of Frank J. Kenney, Dennis L. Prouty, and Michael A. Endicott and

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

-s- Frank J. Kenney

Subscribed and sworn to and returned before me this 11 day of May, 1966.

-s- Louis Stern
Unnted States Commissioner.

1 (one) bank bag containing 92 pennies.
1 (one) billfold ("empty").
4 (four) personal address books.
2 (two) six foot extension cords.
1 (one) key ring with six keys.
assorted "pulp" magazines.
1 (one) piece of 11 x 18 glass and frame.
1 (one) piece of copper plating.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA
v.
GEORGE W. DURHAM,
Defendant.

AFFIDAVIT FOR SEARCH WARRANT

BEFORE LOUIS STERN, Portland, Oregon

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the person of George W. Durham and) on the premises known as Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, and more particularly in a 1959 Traveler trailer, white color, and in a 1955 Dodge Sedan, Oregon License 8M-5106 located at said premises in the District of Oregon, there is now being concealed certain property, namely certain twenty dollar counterfeit federal reserve notes and other counterfeiting paraphernalia which are (See attached sheet)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: (See attached sheet)

-s- Frank J. Kenney,
FRANK J. KENNEY
Special Agent in Charge of Secret Service

Sworn to before me, and subscribed in my presence, May 5, 1966

-s- Louis Stern
LOUIS STERN
United States Commissioner

STATEMENT BY FRANK J. KENNEY, SPECIAL AGENT IN CHARGE OF SECRET SERVICE

On july 12, 1965, a new issue $20 counterfeit note on the Federal Reserve Bank of San Francisco, Series 1950D, Serial Number L54406434C, Check Letter "J", Face Plate Number 254, Back Plate 830, as received by the Metropolitan Branch, U.S. National Bank of Oregon, Portland, Oregon, as part of a deposit to the account of the Oregon State Liquor Commission Store, Store No. 30, Portland, Oregon. On examination of this note, on the back on the border of the left lower corner was an inked notation "8 M 5106", which conforms with the Oregon State Motor Vehicle licensing schedule.

The Oregon State Motor Vehicle Department, Salem, Oregon, records reflect that this license number is assigned to George W. Durham, Box 214, Clackamas, Oregon, for a 1955 Dodge sedan.

On July 19, 1965, George W. Durham appeared at the Commercial Paper Co., 300 Brannan, San Francisco, and attempted to make a purchase of 100 per cent Anniversary Bond paper, which has been identified as the type of paper used in the printing of the counterfeit notes. This type bond paper was not available and Durham purchased six reams 8 1-2" x 11") of Agawan bond. At the time of purchase Durham informed the paper company employee that he was making the purchase for a man in Clackamas, Oregon, who made auto glass patterns and needed the paper for a technical manual. Durham at time of sale displayed his Oregon Driver's license and gave his address as Box 246, Willamina, Oregon, which is the post office box of Roy E. Durham, brother of George Durham.

Investigation has developed that George W. Durham during the years 1964 and 1965 was engaged with Archie Leo Mishler aka Tom Mishler in his printing business at Route 1, Box 483, Clackamas, Oregon. Tom Mishler was arrested by the Secret Service on March 20, 1956, for counterfeiting currency and was placed on probation.

Within recent weeks, a confidential informant has furnished the Government information that during 1964 and 1965 George W. Durham and Tom Mishler had printed up some $20 counterfeit notes.

Durham is residing in a 1959 Traveler trailer, white color, which he is purchasing under contract from Blake and Neal Finance Co., Portland, Oregon. The trailer and vehicle of Durham's is located at Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, where Durham is employed.

-s- Frank J. Kenney
FRANK J. KENNEY,
Special Agent in Charge of Secret Service

SIDNEY I. LEZAK
United States Attorney
District of Oregon
JACK G. COLLINS
First Assistant U.S. Attorney
506 U.S. Courthouse, Box 71
Portland, Oregon 97207
226-3361, Ext. 1531
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, v. GEORGE WASHINGTON DURHAM, Defendant.	**CR 66-133** **FINDINGS OF FACT AND CONCLUSIONS .. OF .. LAW RESPECTING DEFENDANT'S MOTIONS TO SUPPRESS FOR RETURN OF SIEZED PROPERTY**

On June 29, defendant's motion to suppress and for return of certain seized property came on for hearing. Defendant was present and represented by his attorney, Mr. Jonathan Newman. The United States was represented by Jack G. Collins, First Assistant U.S. Attorney. The testimony of Special Agents Frank Kenney, Robert J. Newbrand and Dennis Prouty, and the further testimony of O. F. Killingbeck, together with certain documentary evidence as received. The hearing was continued to July 11, 1966 in order that defendant might further examine Special Agent Frank Kenney and on that

date further testimony of Special Agent Kenney was received.

On the basis of the evidence received at the hearing on defendant's motions, as continued, and the records and files herein, the Court makes the following findings of fact and conclusions of law respecting defendant's motions to suppress and for the return of certain seized property.

FINDINGS OF FACT

I

On May 5, 1966, Special Agent Frank J. Kenney of the United States Secret Service appeared before the Honorable Louis Stern, United States Commissioner at Portland, Oregon and gave his affidavit for search warrant (which affidavit included the further written statement of Special Agent Frank J. Kenney attached thereto). This affidavit and accompanying statement is defendant's Exhibit 4. Based upon this affidavit and the attached statement of Agent Kenney, Commissioner Stern, on May 5, 1966, issued a search warrant. Defendant's Exhibit 5 is the original of this warrant and the return upon such warrant later made on May 11, 1966. The property to be seized is set forth in the search warrant as " . . . namely, certain twenty dollar counterfeit Federal Reserve notes and other coun-

terfeiting paraphanelia which are alleged by the affidavit of Frank J. Kenney, Special Agent in charge of Secret Service, to be at said premises . . ." The description of the property to be seized is further supplemented by the affidavit for search warrant and the statement of Frank J. Kenney attached to such affidavit (defendant's Exhibit 4), which sets forth a particular $20 counterfeit Federal Reserve note, namely a $20 counterfeit note on the Federal Reserve Bank of San Francisco, Series 1950D, Serial Number L54406434C, Check Letter "J", Face Plate Number 254, Back Plate 830.

II

The statement of Special Agent Kenney attached to the affidavit for search warrant (defendant's Exhibit 4) states in part:

> "On July 12, 1965, a new issue $20 counterfeit note on the Federal Reserve Bank of San Francisco, Series 1950D, Serial Number L544064-34C, Check Letter "J", Face Plate Number 254, Back Plate 830, was received by the Metropolitan Branch, U.S. National Bank of Oregon, Portland, Oregon, as part of a deposit to the account of the Oregon State Liquor Commission Store, Store No. 30, Portland, Oregon. On examination of this note, on the back on the border of the left lower corner was an inked notation "8 M 5106" which conforms with the Oregon State Motor Vehicle licensing schedule.
>
> "The Oregon State Motor Vehicle Department, Salem, Oregon, records reflect that this license

> number is assigned to George W. Durham, Box 214, Clackamas, Oregon, for a 1955 Dodge sedan."

Immediately following notification of the receipt of the aforementioned counterfeit note by the Metropolitan Branch, U.S. National Bank of Oregon, Special Agent Kenney went to the bank, identified the note as counterfeit, and learned at the bank of receipt by the bank of this note from the Oregon State Liquor Commission Store, Store No. 30, Portland, Oregon. The inked notation "8 M 5106" upon the counterfeit note was on the note when received by the bank. Agent Kenney then made inquiry of the Oregon State Motor Vehicle Department concerning the number "8 M 5106" and was advised that the records of the Oregon State Motor Vehicle Department, Salem, Oregon, reflect that this license number is assigned to George W. Durham, Box 214, Clackamas, Oregon for a 1955 Dodge Sedan.

III

The statement of Special Agent Kenney attached to the affidavit for search warrant (defendant's Exhibit 4) further states in part:

> "On July 19, 1965, George W. Durham appeared at the Commercial Paper Co., 300 Brannan, San Francisco, and attempted to make a purchase of 100 per cent Anniversary Bond Paper,

> which has been identified as the type of paper used in the printing of the counterfeit notes. This type bond paper was not available and Durham purchased six reams (8 1-2" x 11") of Agawam bond. At the time of purchase Durham informed the paper company employee that he was making the purchase for a man in Clackamas, Oregon, who made auto glass patterns and needed the paper for a technical manual. Durham at time of sale displayed his Oregon Driver's license and gave his address as Box 246, Willamina, Oregon, which is the post office box of Roy E. Durham, brother of George Durham.

Special Agent Kenney had received this information from agents of the Secret Service in San Francisco, California prior to the making of his affidavit for search warrant. The Secret Service agents in San Francisco had received such information from Mr. H. Hayes of the Commercial Paper Company, 300 Brannan, San Francisco, California on July 19, 1965, except as to that portion of the above statement referring to the post office box of Roy E. Durham, brother of George Durham. This latter information Agent Kenney obtained upon his own investigation.

IV

Archie Leo Mishler aka Tom Mishler had been arrested by the Secret Service in this district on March 20, 1956 upon a charge of counterfeiting currency and was convicted upon his plea of guilty

and placed upon probation. *U.S.* v. *Mishler,* Cr. No. 18181, USDC Oregon (1956). Special Agent Kenney possessed such information of his own knowledge prior to and at the time of making his affidavit and the records of this Court so reflect. The remaining information contained in Paragraph 4 of the statement of Frank J. Kenney attached to his affidavit for a search warrant as set forth hereafter was obtained by Special Agent Kenney from an unnamed confidential informant, to wit:

> "Investigation has developed that George W. Durham during the years 1964 and 1965 was engaged with Archie Leo Mishler aka Tom Mishler in his printing business at Route 1, Box 483, Clackamas, Oregon."

V

The statement of Special Agent Kenney attached to the affidavit for search warrant (defendant's Exhibit 4) further states in part:

> "Durham is residing in a 1959 Traveler trailer, white color, which he is purchasing under contract from Blake and Neal Finance Co., Portland, Oregon. The trailer and vehicle of Durham's is located at Orville Fredrick Killingbeck Chicken Farm, 7911 S.E. Thiessen Road, Milwaukie, Oregon, where Durham is employed."

Special Agent Kenney obtained such information from the Blake and Neal Finance Company.

VI

During the course of Special Agent Kenney's investigation, a confidential informant further advised him as set forth in his statement attached to the affidavit for search warrant that,

> "Within recent weeks, a confidential informant has furnished the Government information that during 1964 and 1965 George W. Durham and Tom Mishler had printed up some $20 counterfeit notes."

Said confidential informant is not the same as the confidential informant referred to in Paragraph IV above.

VII

After issuance of the search warrant by Commissioner Stern as aforementioned, and with the search warrant in their possession, Secret Service Agents Robert Newbrand, Dennis Prouty, Endicott, Frank J. Kenney and John Wells, commenced a search of the premises described therein at 7:59 p.m. Pacific Daylight Time on May 5, 1966. Pacific Daylight Time was the time then in effect on May 5, 1966 in this District of Oregon and at the place and premises of the search. At the time of commencement of the search the conditions of daylight were such that a person might easily read a newspaper or recognize a face. Sunset did not occur at

the place of search until 8:22 p.m. Pacific Daylight Time. This search was commenced prior to sunset and during daytime and continued after sunset and during twilight.

VIII

Prior to commencement of the search as aforementioned, Special Agent Robert Newbrand identified himself to defendant Durham. Durhm acknowledged to Agent Newbrand that he was defendant George W. Durham. Newbrand advised Durham of the reason for his presence at that time and place. Durham, accompanied by Newbrand, entered a barn upon the premises, Durham stating that he had certain chores to do in the barn. Durham entered a dumb waiter or elevator in the barn and inquired of Newbrand again the reason of his presence. Newbrand stated the reason for his presence and Durham and Newbrand then approached the Traveler trailer on the premises. Durham stated it was his trailer and was locked, then requested and was given a copy of the search warrant, spent several minutes reading the same. Newbrand requested Durham to open the trailer. Durham obtained the key for the trailer from a hook or nail on which the key was hanging inside the door of the Killingbeck farm house and then opened the trailer and stated that the agents might "get on with your search." He further stated that he was not responsible for

anything inside the trailer for the reason that he had been gone for the past 40 hours. Upon entering the trailer, Special Agent Prouty found twenty dollar counterfeit Federal Reserve notes in a one gallon jar located under a trailer seat plus the other items as set forth upon the return upon the search warrant herein, defendant's Exhibit 5. Such items were produced in Court at time of hearing by the government. There was testimony which shows that certain items are the type which may be used in counterfeiting. Prior to the entry of the trailer, defendant George W. Durham was personally searched by Agent Newbrand and no wallet was found upon his person. Newbrand inquired of Durham as to the whereabouts of his wallet and Durham stated he had no wallet.

IX

Before conclusion of the search, Agent Newbrand wrote upon the copy of search warrant previously delivered by Newbrand to Durham as aforementioned, the description of certain of the items seized as set forth thereon. See defendant's Exhibit 1. This copy of warrant together with certain other articles had been placed together shortly after the commencement of search and the copy of a receipt for contraband was at Durham's request delivered to him by Agent Newbrand. The original of this receipt for contraband is defendant's Exhibit 2.

At the conclusion of the search, defendant was placed under arrest by Newbrand upon a charge of possession of counterfeit securities. 18 U.S.C. Sec. 474. Prior to this hearing defendant had received a copy of the original return of the search warrant.

X

On May 6, 1966, Special Agent Kenney went to the home of Archie Leo Mishler, also known as Tom Mishler, Route 1, Box 483, Clackamas, Oregon and there Mishler's daughter, Mrs. Yackley, volunteered the information that on the preceding day, May 5, 1966, defendant Durham was in the Mishler home and had shown her a wallet containing currency.

XI

On May 7, 1966, Kenney informed Newbrand of his conversation with Mrs. Yackley. Agents Newbrand and Prouty then went to the Killingbeck farm. Agent Newbrand identified himself to Orville Frederick Killingbeck whom he had met on the evening of May 5, 1966 in the course of the search and Killingbeck informed the agents that he had found Durham's wallet on the preceding day in the barn. He delivered the wallet and its contents to the agents upon their request in the same condition as when found. At Killingbeck's request Newbrand

gave him a receipt for the wallet and its contents, defendant's Exhibit 3. I find this testimony much more credible than that of Killingbeck as to the circumstances under which the wallet and its contents were delivered. The wallet contained two counterfeit $20 Federal Reserve notes. The property obtained from Killingbeck on May 7, 1966 was produced by the government at the time of this hearing with the exception of $38 in genuine currency of the United States which was returned to defendant's attorney on May 31, 1966.

Based upon the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

1. The search warrant (defendant's Exhibit 5) describes the property to be seized with sufficient particularity.

2. The property seized on May 5, 1966, which is listed in the return of the search warrant (defendant's Exhibit 5), is properly described.

3. The search warrant was legally and properly executed.

4. There was probable cause for the issuance of the search warrant on May 5, 1966, by Commissioner Louis Stern.

5. The search warrant (defendant's Exhibit 5) and the search pursuant thereto on May 5, 1966 were legally and properly executed and the seizure of the property set forth upon the return to such warrant was legally and properly made.

6. The property obtained by Agents Newbrand and Prouty from O. F. Killingbeck on May 7, 1966, was legally obtained.

7. Defendant is not entitled to an order suppressing evidence and for the return of seized property.

Dated this 5th day of August, 1966.

-s- Gus J. Solomon
JUDGE

PRESENTED BY:
-s- Jack G. Collins
JACK G. COLLINS
First Assistant U.S. Attorney

SIDNEY I. LEZAK
United States Attorney
District of Oregon
JACK G. COLLINS
First Assistant U.S. Attorney
506 U.S. Courthouse, Box 71
Portland, Oregon 97207
262-3361, Ext. 1531
Of Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,
Plaintiff,
v.
GEORGE WASHINGTON DURHAM,
Defendant.

CR 66-133

ORDER DENYING DEFENDANT'S MOTIONS FOR THE SUPPRESSION OF EVIDENCE AND THE RETURN OF SIEZED PROPERTY

Based upon the Findings of Fact and Conclusions of Law previously entered herein, it is ordered that defendant's motions for the suppression of evidence and the return of seized property of evidence as listed in the return of search warrant (defendant's Exhibit 5) which property was seized by agents of the Secret Service on May 5, 1966 and defendant's further motions for the suppression of evidence and the return of seized property as listed on defend-

ant's Exhibit 3, which property was obtained by agents of the Secret Service on May 7, 1966 from O. F. Killingbeck should be and each of such motions is denied.

Dated: August 5, 1966.

-s- Gus J. Solomon
Judge

PRESENTED BY:
-s- Jack G. Collins
JACK G. COLLINS
First Assistant U.S. Attorney

UNITED STATES OF AMERICA

vs.

GEORGE WASHINGTON DURHAM,

Defendant.

NO. CR 66-133

INDICTMENT

(18 U.S.C. § 474)

THE GRAND JURY CHARGES:

COUNT I

(18 U.S.C. § 474)

On or about May 5, 1966, in and at a trailer-house located on the O. F. Killingbeck Farm, 7911 S.E. Thiessen Road, Milwaukie, in the District of Oregon, GEORGE WASHINGTON DURHAM, defendant, did unlawfully, wilfully and knowingly have in his possession and custody, without authority from the Secretary of the Treasury or other proper officer, an obligation and security made and executed after the similitude of an obligation and security issued under the authority of the United States, that is, a purported $20 Federal Reserve Note on the Federal Reserve Bank of San Francisco, series of 1950 D, check letter J, face plate No. 254, back plate No. 946, serial No. L54406434C, with intent to sell or otherwise use the same; in violation of Section 474, Title 18, United States Code.

COUNT II

(18 U.S.C. § 474)

During the period May 1 through 7, 1966, in and at a barn located at the O. F. Killingbeck Farm, 7911 S.E. Thiessen Road, Milwaukie, in the District of Oregon, GEORGE WASHINGTON DURHAM, defendant, did unlawfully, wilfully and knowingly have in his possession and custody, without authority from the Secretary of the Treasury or other proper person, an obligation and security made and executed after the similitude of an obligation and security issued under authority of the United Sttes, that is, a purported $20 Federal Reserve Note on the Federal Reserve Bank of San Francisco, series of 1950 D, check letter J, face plate No. 254, back plate No. 946, serial No. L54406434C, with intent to sell or otherwise use the same, in violation of Section 474, Title 18, United States Code.

COUNT III

(18 U.S.C. § 474)

On or about May 5, 1966, within the District of Oregon, GEORGE WASHINGTON DURHAM, defendant, did unlawfully, wilfully and knowingly have in his control, custody and possession a plate and thing made after and in the similitude of a plate and thing from which an obligation and security of the United States has been printed, with intent to use

such plate and thing or to suffer the same to be used in forging and counterfeiting an obligation and security of the United States, that is a forged and counterfeited $5 United States Note, series 1963, check letter H, face plate No. 6, series No. A 15829646A with facsimile signatures of Kathryn O'Hay Granahan, Treasurer of the United States and C. Douglas Dillon, Secretary of the Treasury, in violation of Section 474, Title 18, United States Code.

Dated this 13 day of June, 1966.

-s- Darrell DeBorde
FOREMAN

SIDNEY I. LEZAK
United States Attorney
District of Oregon
-s- Jack G. Collins
JACK G. COLLINS
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: 24th day of July 1967.

JACK G. COLLINS
First Assistant United States Attorney

No. 21,652

IN THE

United States Court of Appeals

For the Ninth Circuit

PAXTON TRUCKING COMPANY, a corporation, and WILLIAM EARL BAILEY,
Appellants,

vs.

THE CUDAHY PACKING COMPANY,
Appellee.

On Appeal from the United States District Court for the District of Nevada

BRIEF FOR APPELLANTS

GUILD, GUILD & CUNNINGHAM,
West First at Roff Way,
Reno, Nevada 89501,
Attorneys for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 21,652

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from a money judgment entered November 18, 1966, by the United States District Court for the District of Nevada in favor of Appellee and against Appellants in the sum of $9,794.12, together with costs. (R. 46.) The underlying action was brought by Appellee on November 23, 1965 in the Sixth Judicial District Court of Nevada for the County of Humboldt and Petition for Removal therefrom to the United States District Court for the District of Nevada was filed January 3, 1966. (R. 2-11.) The bases for removal were that the United States

District Court had original jurisdiction under Title 28, U.S.C., Section 1332 and the action was one which Appellants were entitled to remove to it from the Nevada Court pursuant to Title 28, U.S.C., Section 1441, in that the matter in controversy exceeded the sum of $10,000.00 exclusive of interest and costs, and in that prior to and at all times since the commencement of the action the corporate Appellant had been incorporated under the laws of California, having its principal place of business there, Appellant Bailey had been and was a citizen of California, and Appellee had been incorporated under the laws of Maine, having its principal place of business in Arizona. (R. 1-2.)

Appellants, on November 28, 1966, filed timely Motions for New Trial and to Amend Findings of Fact, Conclusions of Law and Judgment. (R. 50-54.) The Court on December 27, 1966 entered its Order denying these Motions. (R. 57-58.) Appellants on January 4, 1967 filed a timely Notice of Appeal to this Court. (R. 60.) This Court's jurisdiction accordingly rests upon Title 28, U.S.C., Section 1291.

STATEMENT OF THE CASE

This is an action brought by Appellee against Appellants for property damage arising out of a collision between the motor vehicles of the parties on U. S. Highway 40, near Winnemucca, Nevada, on February 19, 1965.

Appellant William Earl Bailey, hereinafter called "Bailey", owned and operated a 1960 Peterbilt Tractor. (T. 113:14-25.) He hauled cargo with it under contract with Appellant Paxton Trucking Company, hereinafter called "Paxton". (T. 114:6-25.) On February 18, 1965, in Salt Lake City, Utah, Bailey attached his tractor to a Paxton trailer loaded with ten tons of steel and drove west into Nevada at dusk. In the early morning of February 19, 1965, he stopped in Winnemucca, Nevada, for coffee and then continued west. (T. 115:12-116:13.)

Shortly after leaving Winnemucca, his engine throttle cable came unhooked without warning, the acceleration foot pedal became limp and the engine began racing wildly. (T. 115:18-25; 153:16-19; 116: 18-21.) Thinking the throttle cable to be broken, Bailey turned off the engine to save it from damage, took the truck out of gear and coasted, looking for a place to pull off the roadway. (T. 118:6-19; 135:20-23; 116:21-117:5.)

The roadway in this vicinity was level and straight for a distance of nearly a mile. (T. 41:14 to 42:4; 55: 2-21; 90:7-22.) There were two lanes, one for traffic in each direction, each of which was approximately 17 feet wide. (Diagram, Plaintiff's Exhibit 4.) In addition there were oiled shoulders adjacent to the lanes which were nearly wide enough to accommodate a car. (T. 88:8-12.) Adjacent the shoulder to the westbound lane was a flat, "awfully sandy" area. (T. 108:3-6.) Adjacent the shoulder to the eastbound lane was a graveled

parking area 175 to 200 feet wide and 130 feet long, which fronted a motel business. (T. 25:18-25; 17; 116: 24-25.)

Bailey feared pulling off the road to his right (the flat sandy area), not trusting that terrain in wintertime. (T. 117:2-3; 136:12-19.) However, he was about to do so when he discovered the motel parking yard to his left, across the highway. (T. 116:23-25.) Thinking the ground there to be solid, and thinking there to be more room to permit him to be clear of the highway, he turned into the motel yard to his left. (T. 116:23-25; 117:3-8.) When he coasted to a stop he discovered that his truck was not clear of the roadway and he tried to start his engine. The starter was dead and he began frenzied, but unsuccessful, efforts to start the engine, both by use of the starter button and the solenoid. (T. 117:11-25.) As Bailey put it, "I was going crazy, because after seeing this trailer partially on the highway, I knew what my trouble was." (T. 7: 20-22.)

Opinions varied as to how much of the roadway was blocked by the trailer. Bailey estimated it as five feet of the eastbound lane only. (T. 117:24-25.) Appellee's driver, John Dodd, said it covered the eastbound lane and part of the westbound lane. (T. 42: 19-20.) Wayne Morrow, an eyewitness, said the back-end of the trailer was out into the eastbound lane, not quite at a 90 degree angle to it, but could not say for sure whether it was sticking out into the westbound lane. (T. 89:6-9.) However, the physical facts developed at trial concerning the subsequent collision

with the trailer were that the left wheels of the eastbound colliding vehicle (owned by Appellee Cudahy Packing Company, hereinafter called "Cudahy"), were at point of impact in the eastbound lane, 6 feet 7 inches from the center line of the highway (T. 28:4-20); that the Paxton trailer had two rear axles (or tandem axles), the forwardmost of which was 6 feet 5 inches from the rear end of the trailer (T. 135:3-25); that the front of the Cudahy tractor at impact was as right angles with the right rear side of the Paxton trailer (T. 61:17-22; 62:5-7); and that the center of the front of the Cudahy tractor at impact was in line with the center of the forwardmost of the rear Paxton axles (T. 61:2-62:25). The inescapable inference is that the rear end of the Paxton trailer was stopped well into the eastbound lane, but clear of the westbound lane prior to impact.

As Bailey continued his frantic efforts to start his engine, Wayne Morrow drove up from the east, from Winnemucca, in his Pacific Motor Transport Tractor and Trailer. (T. 118:20-118a:15.) Morrow, a driver of several years of daily experience on this particular route, had seen the Paxton trailer's clearance lights sticking out in the road from a distance of a quarter of a mile away. (T. 85:2-11; 86:19-87:6.) He stopped his truck partly on the oiled shoulder and partly on the dirt adjacent the westbound lane, at a point 150 feet east of the stalled Paxton tractor. (T. 87:18-88:24.) Morrow and Bailey blinked their lights at one another, and then Bailey heard a truck coming from the west. (T. 118a:12-18.)

Morrow saw the lights of the oncoming Cudahy truck as it came off a hill a mile or just under a mile to the west. The lights were in the eastbound lane of traffic. (T. 90:7-22.) When the oncoming truck was halfway down the little hill, Morrow turned his lights off and on three times to warn its driver of danger. (T. 90:24-91:21.) The flashing of headlights on and off three times is a warning of danger in the trucking business. (T. 90-24 to 91:11; 119:10-14.) The oncoming Cudahy vehicle, its lights on low beam, blinked its lights to high beam, and then back down to low beam again. (T. 91:13-19.) As the Cudahy truck got closer Morrow observed the clearance lights on the Paxton trailer to give the series of three blinks. This time the oncoming vehicle was a quarter of a mile or more away. It gave no response to the signal. (T. 92:3-20.) When the Cudahy truck was still a quarter of a mile or more away, Morrow observed the clearance lights on the Paxton trailer to go out and remain off for what seemed to be about 30 seconds. (T. 100:13-16; 105:7-17.) It seemed to Morrow that this was done in order to get more juice to the Bailey tractor. (T. 105: 7-17.) Morrow then observed the Paxton trailer clearance lights to go on again when the Cudahy truck was still maybe "a couple of hundred or three hundred feet" away or "even farther than that, for that matter." (T. 100:20-101:9.)

Dodd, the Cudahy driver, apparently did not see the signals. The first he saw of the trailer was its reflector on the right side. (T. 58:28-59:3.) At trial Dodd answered the cross-examiner that when he first

saw the trailer, "It seemed like it was as close from me to you. I was right there." (T. 53:15-17.) Likewise, he had seen no signal from the P.M.T. truck (Morrow) until immediately prior to impact. What he then did see he did not consider to be a signal: "Just dancing up and down on his dimmer switch." (T. 56:15-19.) He saw this when, according to his best estimate, he was 200 feet away, very, very shortly before he put on his brakes. (T. 57:5-13.) That which caused him to put on his brakes was the sight of the trailer in front of him. (T. 57:14-16.) Until this moment the Cudahy driver was maintaining, and had maintained for the five minutes previous, a constant speed of 57 miles per hour. (T. 44:12 to 45:5; 54:25 to 55:1.) The speed limit in this vicinity was 55 miles per hour. (T. 20:13-15.)

Morrow gave no testimony concerning the use of his dimmer switch immediately prior to the collision. He did, however, state that he asked Dodd after the crash if he had seen his lights; that Dodd answered that he had but just figured there was a cow in the road. (T. 97:16-22; 99:7-13.) Dodd testified that he did not think that he made such a statement (T. 155: 6-10), but that he does remember Morrow saying, "I tried to warn you." (T. 64:3-11.)

The front of the Cudahy tractor collided with the right rear of the Paxton trailer, generally damaging the center and right side of the former. (T. 61:2 to 62: 15; Defendants' Exhibits D and E; Plaintiff's Exhibit 8.)

SPECIFICATION OF ERRORS RELIED ON

1. That the Court erred in finding that Appellants were negligent.

2. That the Court erred in finding that any negligence of Appellants was the proximate cause of damages to Appellee.

3. That the Court erred in finding that there was no contributory negligence on the part of John Walter Dodd, the agent of Appellee and driver of Appellee's truck.

4. That the Court erred in denying Appellants' Motion to Amend Findings of Fact, Conclusions of Law and Judgment.

5. That the Court erred in denying Appellants' Motion to set aside Findings of Fact, Conclusions of Law and Judgment, and to grant Appellants a new trial on the ground that the judgment is contrary to law.

QUESTIONS PRESENTED

1. Whether the Court's finding that Appellants were negligent was clearly erroneous.

2. Whether any conduct of Bailey was the proximate cause of the collision.

3. Whether the Court's finding that John Walter Dodd was free from contributory negligence is clearly erroneous.

   a. A consideration under the doctrine of negligence per se.

b. A consideration under the doctrine of range and vision.

SUMMARY OF ARGUMENT

Upon an examination of the entire record, there is no substantial evidence to support the trial Court's findings of Appellants' negligence, proximate cause and Appellee's freedom from contributory negligence. There is substantial evidence to support findings of Appellants' freedom from negligence, Appellee's contributory negligence and that the latter was the proximate cause of the collision. Therefore, the Court's findings are clearly erroneous and the judgment ought to be reversed.

ARGUMENT

I. WHETHER THE COURT'S FINDING THAT APPELLANTS WERE NEGLIGENT WAS CLEARLY ERRONEOUS.

> "In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action." Restatement, Second, Torts, Section 296 (1).

This special application of the reasonable man rule, the so-called "sudden emergency" doctrine, has been applied by this Court relative to Nevada in the past. *Vascacillas v. Southern Pacific Company,* 247 Fed. 8 (C.A. 9).

Bailey was clearly confronted with a sudden emergency. His engine commenced racing wildly. (T. 115; 116; 153.) To preserve it he turned it off and coasted looking for a place to park. (T. 118; 135; 116.) Perhaps he might have parked safely by pulling off to his right, on the northerly side of the road, in the sandy area, but he had been stuck in soft dirt once before that day and he did not trust the terrain. (T. 108; 117; 136; 127.) He then saw, and turned for, solid ground to the left across the highway to its southerly side. His trailer failed to clear the highway. (T. 116; 117.) Events proved that he chose the less wise of two parking areas; he could safely have parked on his right as Morrow, the P.M.T. driver, proved was possible. (T. 108.)

And so Bailey, faced with a power failure and knowing that he must clear the highway, erred in thinking that as between two alternative parking areas he could reach the farthest distant and more desirable. Is that negligence? As this Court said in *Vascacillas, supra,* "One exposed to sudden danger is not chargeable with negligence simply because he does not adopt the safest course to avoid injury." *Vascacillas v. Southern Pacific Company, supra* at page 12.

True, the trial Court, sitting without a jury, has found Appellants negligent. And true, Nevada has consistently adhered to the rule that such findings will not be disturbed on appeal when supported by substantial evidence even though substantial evidence may exist against such a finding. *Graventa v. Graventa,* 61 Nev. 407, 131 P.2d 513; *Harvey v. Streeter,* 81 Nev.

177, 400 P.2d 761. However, when it appears to the reviewing Court, after an examination of the entire evidence, that a finding is clearly erroneous then such finding cannot stand notwithstanding there is some evidence to support it. *Nuelsen v. Sorensen,* 293 F.2d 454 (C.A. 9).

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *United States v. U. S. Gypsum Company,* 333 U.S. 364, 92 L.Ed. 747.

The Nevada and Federal decisions relating to findings and evidence can be reconciled for application to this case: If indeed the choice of the poorer of two parking places when faced with a runaway engine is evidence of negligence, it is not, after an examination of the record, substantial. Therefore, the finding is clearly erroneous and ought to be discarded. The Court is urged the judgment should be reversed.

II. WHETHER ANY CONDUCT OF BAILEY WAS THE PROXIMATE CAUSE OF THE COLLISION.

In the case of *Weck v. Reno Traction Company,* 38 Nev. 285 at 297, 149 Pac. 65, the Court adopted the classic definition of proximate cause with this language:

> "That only is a proximate cause of an event, juridically considered, which, in a natural sequence, unbroken by any new and intervening

> cause, produces that event, and without which that event would not have occurred. It must be an efficient act of causation separated from its effect by no other act of causation. If, after an act of omission constituting negligence on the part of one injured at a railroad crossing, the railroad car or cars might have been so controlled by the exercise of reasonable care and prudence on the part of those in charge of them, as to avoid the injury, then a failure to exercise such care and prudence would be an intervening cause, and so the Plaintiffs' negligence no longer a proximate cause, and therefore not a bar to his recovery."

Was it negligence to choose a parking place unwisely? If so, did it proximately cause the collision? Or was it negligence to rely on the P.M.T. truck (Morrow) to do the signaling? If so, did it proximately cause the collision? As to the latter, Morrow *did* signal for Bailey (T. 90), but to no avail. Appellee's driver saw no signal until he was within 200 feet of the collision. (T. 57.) And so neither the wisdom of Bailey's frenzied choice of a parking place in an emergency situation nor of permitting the P.M.T. truck to do the signaling while Bailey continued his frantic efforts to start his truck, can be said to have proximately caused the crash. This is so because a warning signal of the danger was given and available to be seen by Appellee's driver and agent. It was ahead of him on the open roadway and he did not see it.

> "A person of normal faculties of sight and hearing is presumed to have heard and seen that which was

within the sight and range of vision." *L.A. & S. L.R. Co. v. Umbaugh,* 61 Nev. 214 at 236, 123 P.2d 224.

How applicable Dodd's conduct is to the early definition of proximate cause in *Week v. Reno Traction Company, supra.* The third sentence of the quoted language from that opinion might be paraphrased thus: If, after an act of negligence on the part of Bailey, the Cudahy truck might have been so controlled by the exercise of reasonable care and prudence on the part of Dodd, as to avoid the collision, then a failure to exercise such care and prudence would be an intervening cause, and so Bailey's negligence no longer a proximate cause and therefore not a ground for recovery against him.

The Court is urged that the Court's finding that negligence on the part of Appellants was the proximate cause of damages to Appellee is clearly erroneous.

III. WHETHER THE COURT'S FINDING THAT JOHN WALTER DODD WAS FREE FROM CONTRIBUTORY NEGLIGENCE IS CLEARLY ERRONEOUS.

A. A Consideration Under the Doctrine of Negligence Per Se.

Prosser defines negligence per se as

"the standard of conduct required of a reasonable man (which is) prescribed by legislative enactment. When a statute provides that under certain circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard for all members of the community, from which

it is negligent to deviate." William L. Prosser, Law of Torts, Third Edition, page 191.

The question whether this doctrine is applicable to contributory negligence is put in an article found at 171 A.L.R. 894, thus:

> "To the common-law liability for negligence, contributory negligence of the Plaintiff is ordinarily a good defense. The question has frequently arisen as to whether the same rule applies where the duty of care arises not under the common law rules of negligence but under statutes prescribing or proscribing a course of conduct, without reference to whether such conduct or its omission would have constituted negligence at common law."

This question was answered for Nevada in *Styris v. Folk,* 62 Nev. 208 at 219, 139 P.2d 614:

> "There is no difference in principle as to the effect of negligence whether arising by violation of an ordinance, or by ordinary negligence."

The Court then cited with approval the following language from *Smith v. Zone Cabs,* 135 Ohio St. 415, 21 N.E.2d 336:

> "Negligence per se and proximate cause are two separate and distinct issues. *One is presumed as a matter of law,* the other must, nevertheless, be proved as a matter of fact." (Emphasis supplied.)

The evidence is uncontradicted that the headlights of the Cudahy truck were on low beam at all times. When the Cudahy truck was halfway down the little

hill, about a mile away, the P.M.T. driver flashed a warning signal with his lights. (T. 90.) As if in response, Cudahy's driver switched his headlights from low beam to high beam and back to low beam again. (T. 91.) Thus, the Cudahy truck lights were on low beam when the truck topped and started down the hill and were returned to low beam after giving the only signal given by him, nearly a mile from the point of impact. (T. 90.) That near mile was driven by the Cudahy driver, his lights obviously on low beam, at a constant speed of 57 miles an hour. (T. 44; 45; 54; 55.)

N.R.S. 484.410 requires that the driver at nighttime use a distribution of light, or composite beam, high enough and of sufficient intensity to reveal persons and vehicles at a safe distance in advance of the vehicle. Dodd ignored this requirement and proceeded for nearly a mile at a steady 57 miles per hour with his lights on low beam until he collided with Appellants' vehicle in a 55 mile per hour zone. (T. 20.) He did not see the reflector on the side of the trailer until it was immediately in front of him, or as he said to cross-examining counsel, "As close as from me to you." (T. 42; 53.) If indeed Appellants' trailer lights were off (Dodd asserts they were off although Morrow states they were on), couldn't Dodd have seen the trailer reflector sooner had his lights been on high beam?

N.R.S. 484.400.1 requires that the high beam of a vehicle be so aimed and of such intensity as to reveal persons and vehicles at a distance of at least 350 feet

ahead. Assuming that the Cudahy headlights were in a condition which conformed to the Nevada Statute, the use of them as prescribed by the statute, i.e., on high beam, would have revealed the stalled trailer to the Cudahy driver when he was 350 feet away. That is more than three times the distance of his pre-collision skid marks. (Plaintiff's Exhibit 4; T. 20.)

The Court did not consider whether the conduct of Dodd was in any way the proximate cause of the collision and resulting damage. Rather, it merely found Dodd not to have been negligent, necessitating no further inquiry into his conduct. It is urged that this is clearly erroneous upon an examination of the record; that the trial Court should have concluded that Appellee's driver and agent was contributorily negligent as a matter of law and then made a determination whether this contributory negligence was the proximate cause of the collision.

B. A Consideration Under the Doctrine of Range and Vision.

Nevada has adopted the so-called range of vision rule as set forth in *Burlington Transportation Company v. Wilson,* 61 Nev. 22, 110 P.2d 211, 114 P.2d 1093 and in *Rocky Mountain Produce Company v. Johnson,* 78 Nev. 44, 369 P.2d 198. The rule is succinctly stated in *Tracy v. Pollock,* 79 Nev. 361 at 364, 385 P.2d 340: "It is the duty of a driver of a motor vehicle using a public highway in the nighttime to be vigilant at all times and to drive at such rate of speed and to keep the vehicle under such control that, to avoid a collision, he can stop within the distance the

highway is illuminated by its lights." The Court in a footnote added "the distance of one's range of vision over Nevada deserts, because of the unobstructed vastness, may be difficult for many to comprehend."

In the *Tracy* case Defendant driver estimated his speed at 50 miles an hour. He had his lights on low beam. He saw a stalled vehicle in his lane ahead when he was 100 feet away. He applied his brakes and collided with the stalled vehicle. In the present case Defendant driver estimated his speed at 57 miles per hour. (T. 44; 45; 54; 55.) His lights were on low beam. (T. 91.) He saw a stalled vehicle in his lane ahead when he was "right there" (T. 53), a distance away which didn't seem to him to be as much as 113 feet. (T. 42.) He applied his brakes and collided with the stalled vehicle. (T. 43; 61.)

Dodd, by his own admission, was out-driving his headlights. The Court is urged that he is clearly contributorily negligent and that the Court's finding to the contrary is clearly erroneous under the rules hereinabove stated.

Actually, it is not as if the trial Court considered the conduct of Dodd and found him free of contributory negligence notwithstanding that conduct. Rather, the trial Court seemed to find Appellants liable without considering Dodd's conduct. Upon announcing its decision, the Court added, "There is a lot more to how a lawsuit looks to a Judge or a jury than what you read in the books; and although I know it is important to analyze the case carefully, generally speak-

ing this type of case, if somebody leaves an obstruction in the middle of a busy transcontinental highway, there isn't much you can say to defend him." (T. 159.)

CONCLUSION

The Court is urged that the judgment herein be reversed and the cause remanded with instructions to enter judgment for Appellants.

Dated, Reno, Nevada,
July 5, 1967.

Respectfully submitted,
GUILD, GUILD & CUNNINGHAM,
Attorneys for Appellants.

CERTIFICATE OF COUNSEL

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

GUILD, GUILD & CUNNINGHAM,
Attorneys for Appellants.

(Appendix Follows)

Appendix

Appendix

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No. 21,652

IN THE

United States Court of Appeals

For the Ninth Circuit

PAXTON TRUCKING COMPANY, a corporation, and WILLIAM EARL BAILEY,
Appellants,

vs.

THE CUDAHY PACKING COMPANY,
Appellee.

On Appeal from the United States District Court for the District of Nevada

BRIEF OF APPELLEE

PETER ECHEVERRIA, Esq.
Attorney at Law
555 South Center Street
Reno, Nevada 89501
and
JAMES A. CALLAHAN, Esq.
Attorney at Law
Professional Building
Winnemucca, Nevada 89445

Attorneys for Appellee.

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BRIEF OF APPELLEE

PRELIMINARY STATEMENT

The Opening Brief of Appellants was received by counsel for Appellee on July 7, 1967. This Brief is in answer thereto. For the purpose of brevity and to conform with the descriptive terminology employed in the Appellants' Opening Brief, the Appellant William Earl Bailey will be hereinafter called "Bailey", the 1960 Peterbilt tractor will be designated as the "Peterbilt tractor", the trailer belonging to the Appellant Paxton Trucking Company will be hereinafter called the "Paxton

trailer", the Kenworth tractor and trailer belonging to the Cudahy Packing Company will be hereinafter called the "Cudahy truck", and the Pacific Motor Transport truck driven by Wayne Morrow will be hereinafter called the "P.M.T. truck".

The following additional testimony is set forth in addition to and in controvention to the statement of the case appearing in Appellants' Brief.

ADDITIONAL STATEMENT OF THE CASE

Additional Circumstances in Relation to the Conduct of Bailey

Bailey depended on Morrow and the P.M.T. truck to signal on-coming traffic (T. 141:18-20). He admitted that it was a mistake (T. 141:15-17); that he didn't put out flares (T. 104:7-13) (T. 141:21-23); that he couldn't remember signalling with his flashlight (T. 142:1-3).

Bailey was out of the cab two or three times trying to start the motor manually (T. 151:13-19). Bailey had to get out of the cab to go to the starter and solenoid (T. 151:5-9) and when he was out of the cab he couldn't blink his lights (T. 151:10-12). The tractor started immediately after the impact (T. 152:9-13) when he pulled the wrecked trailer off the highway (T. 153:1-5) and operated

satisfactorily for some period of time after (T. 153:6-8).

Bailey was coasting along when his motor started running wild and he shut the motor off. He then looked for a place to turn off to the right (north of highway) and saw what he believed to be a space south of the highway and decided to pull over there (T. 116:18-25) (T. 117:1-8).

The lights were turned out by Bailey on his truck and trailer while he tried to start the engine. Bailey testified that he probably did turn them off after he heard the Cudahy truck (T. 119:1-3). Morrow testified that Bailey's lights were off for at least one-half minute when the Cudahy truck was more than a quarter of a mile up the road (T. 100:13-19) (T. 105:18-20) (T. 110:7-19). Dodd testified that he did not see any lights on the Paxton trailer and Peterbilt tractor (T. 44:22-25).

The Cudahy relief driver, Lynn G. Larsen, was present when Bailey , immediately after the collision, stated that he was sorry; that he was having truck trouble and that he was under his truck when he heard the Cudahy truck coming and he jumped out and watched the collision (T. 70:2-9).

Additional Circumstances in Relation to the Conduct of Dodd

Dodd saw the trailer when he was immediately

in front of it (T. 42:5-13), at least 113 feet away. The P.M.T. truck appeared to be in the west-bound lane, even with the Paxton trailer (T. 43: 6-10). Dodd immediately applied the air brakes (T. 43: 14-16). He did not see lights on the trailer but only the reflector (T. 45:1-3). It did not appear that there was room to pass between the rear end of the Paxton trailer and the P.M.T. truck (T. 46:8-17). The P.M.T. truck blinked its lights at him about the same time as he saw the trailer (T. 56:11-13) about 200 feet away. The speed of the Cudahy truck was fifty-seven (57) miles per hour (Ptf. Ex. 1) and the brakes and lights were in good condition, having been checked by mechanics before each run in Salt Lake City, Utah (T. 47:3-7) and road-checked by Dodd and his driving partner, Lynn G. Larsen, every fifty (50) miles (T. 47:14-17).

Additional Circumstances Surrounding the Collision

Morrow testified "that the Paxton trailers when they are broadside are hard to see, having three possibly four lights on them in a straight row . . . that there are several motels . . . with red lights and green lights and it would be easy to confuse it with the lights that were shining from motels (T. 103:18-25).

The Paxton trailer had two tail lights, but Bailey

could not testify that they were visible to the side (T. 147:23-25). In fact, he was not too familiar with the trailer as he had just picked it up in Salt Lake City the day prior to the accident (T. 121: 15-22) (T. 147:20-22).

Morrow testified that the area to the north of the highway . . . "awfully sandy. But it is flat there. There is no ditches or anything, and the barrow pit doesn't amount to anything". (T. 108: 4-6). Morrow further testified that he could have moved his P.M.T. truck out to the right (north) of the highway with no problem at all. (T. 108: 7-9).

Dodd testified that Morrow had made an accusatory statement in Bailey's presence, which was not denied by Bailey, that Bailey had turned out his lights (T. 49:22-25) (T. 50:1-7).

Dodd's relief driver, Lynn G. Larsen, who at the time of the collision was asleep in the sleeper portion of the cab of the Cudahy truck (T. 67: 20-22), after ascertaining that Dodd was not badly hurt, put flares on in front of the Cudahy truck and about fifty (50) feet to the rear. There had been no flares placed anywhere for warning prior to this time (T. 67:23-25) (T. 68:1-15). Morrow also put out flares (T. 96:10-11).

Larsen further testified that when he placed

the flares, after the collision, that that there were no lights on the Peterbilt tractor or the Paxton trailer (T. 68:23-25) (T. 69:1-2) (T. 73:5-21).

ARGUMENT

I. WHETHER THE COURT'S FINDING THAT APPELLANTS WERE NEGLIGENT WAS CLEARLY ERRONEOUS.

Appellants seek to apply the doctrine of "sudden emergency" to the situation here. They cite as authority Restatement, Second, Torts, Section 296(1). Reference is made to Comments A and C immediately following the above-quoted section.

Comment A . . . ."This section is applicable where the sudden emergency is created in any way other than by the actor's own tortuous conduct or where it is created by the unexpected operation of a natural force or by the innocent or wrongful act of a third person".

Comment C . . . ."In determining whether the actor is to be excused for an error of judgment in a sudden emergency, importance is to be attached to the fact that many activities require that those engaged in them shall have a special aptitude or such training as to give them the ability to cope with those dangerous situations which are likely to arise

in the course of such activities." Following thereafter was an example of a dri ver of a high-speed inter-urban omnibus.

Bailey had been a diesel truck driver for five years; in fact, his entire experience had been with the Peterbilt tractor, the one involved in this collision (T. 114:1-5). A higher degree of aptitude would be required of him than of the ordinary individual in the event of engine or throttle failure. The case of Vascacillas vs. Southern Pacific Company, 247 Fed. 8 (C.A.9) involves an entirely different set of circumstances. There the plaintiff had pulled onto a railroad crossing and, as he entered into the crossing area, the train gates came down as the train approached the crossing. The alternative courses of action to the plaintiff were whether to turn his team and wagon around and avoid the train from the direction in which he had come, or to proceed and clear the crossing. He chose to proceed. The collision with the train occurred, and the plaintiff was injured. In the Vascacillas case we have the emergency created by the action of a third person, i.e. the train. In the instant case the emergency is created by the truck driven by Bailey.

Further, Appellants would base the negligence, if any, of Bailey in selecting the area across the highway for parking his truck rather than the area to the north of the highway.

There was more than the choice of location involved here. Bailey, in addition, turned off his motor while the truck was in motion, relying on his ability to coast to the stopping place chosen by him. After stopping he failed to place flares warning east-bound and west-bound traffic. He turned off his lights endeavoring to start the vehicle.

Finally, the trial court has determined that the conduct of Bailey was negligent. The scope of review mentioned by the Appellants is specifically set forth in Rule 52 A of the Federal Rules of Civil Procedure . . . "Findings of Fact shall not be set aside unless clearly erroneous and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses". Reference is made to Title 28, U.S. Code Annotated, Rule 52, Note 37, and the numerous cases cited thereunder. It is urged that there is substantial evidence to support the decision of the District Court that Bailey was negligent, and that there is no substantial evidence existing against such a finding.

II. WHETHER ANY CONDUCT OF BAILEY WAS THE PROXIMATE CAUSE OF THE COLLISION

The Nevada Supreme Court in MAHAN v. HAFEN, 351 P. 2d. 617 (1960), restates the definition of proximate cause as "proximate cause is any cause being in natural and in continuous sequence unbroken

by any intervening cause, produces the injury complained of and without which the result would not have occurred". Appellants again argue that there was only one proximate cause of injury consisting of only one factor, one act and one element of circumstance, i.e. the choice of location by Bailey. We have stated before that the negligence of Bailey consisted, in addition to this factor, in his shutting off his engine before his truck had reached a place of safety, in his failure also to put out flares and his turning off his lights in endeavoring to start his vehicle. Without these series of acts of negligence on the part of Bailey, the collision with the Cudahy truck would not have occurred.

Dodd testified that he saw no signal until he was within 200 feet of the collision. There is a conflict of testimony in this regard, and the lower Court has resolved it in favor of the Appellee. This must be accepted as true; that Dodd acted immediately in regard to this warning is testified to by him (T.57:5-8) and the fact that he immediately put on his brakes as borne out by the skid marks starting within 113 feet from the point of impact (T. 20:16-18). Appellants urge that Dodd was contributorily negligent and that such contributory negligence was an intervening cause so that Bailey's negligence was no longer the proximate cause. The answer to this is simply that the lower Court has held that Dodd was not negligent and, certainly then, the acts of the Appellant Bailey were directly respons-

ible for the damages suffered by the Appellee.

Reference is made to the Nevada case of Alex Novack & Sons vs. Hoppin, 359 P. 2d. 390 (1961), where the circumstances involved were similar to those we have in the instant case. There the defendant Johnson parked his truck on the shoulder of the road protruding into the lane of traffic and failed to put out flares and turned off his lights, although he did place reflector-type flares to the rear of the parked equipment. Drivers of other vehicles travelling in the same direction as Johnson testified that due to the fact of faulty lighting on equipment driven by Johnson they had not seen such equipment until in its immediate proximity, when each of such drivers overtaking Johnson had successfully taken last-minute emergency action to avoid the collision. The deceased failed to take this emergency action and the collision occurred. The Supreme Court upheld the judgment of the lower Court against Johnson and the owner of the parked equipment, Alex Novack & Sons.

A further discussion of the matter of contributory negligence appears below.

III. WHETHER THE COURT'S FINDING THAT JOHN WALTER DODD WAS FREE FROM CONTRIBUTORY NEGLIGENCE WAS CLEARLY ERRONEOUS

A. Consideration of the cause under the doctrine of negligence per se.

Appellants have argued that Dodd was negligent as a matter of law for travelling down the highway with lights at what is commonly known as "low-beam". Appellants' witness, Wayne Morrow, testified to this and that this was done in response to his flicker of his lights. N.R.S. 484.410, Subsection 1, also requires that a driver of a vehicle approaching an on-coming vehicle within 500 feet shall use a distribution of light so aimed that the glowing rays are not projected into the eyes of the on-coming driver. This is defined in N.R.S. 484.400, Subsection 2, as of an intensity to reveal persons or vehicles at a distance of, at least, 100 feet ahead. The P.M.T. truck with its lights on was parked in the vicinity of the Paxton trailer. Morrow testified somewhere in the neighborhood of 150 feet to the east. Dodd testified that it appeared in the lane of traffic, and he could not tell whether it was standing or proceeding west. Dodd performed the act that was required of him by statute, and that was when he observed the P.M.T. lights he dimmed his own lights to "low-beam".

If Appellants argue that Dodd dimmed his lights prematurely, this is based solely on the testimony of Morrow. Certainly, when he was more than 350 feet from the Paxton trailer, he was no longer in violation of the statute. Assuming that the lights of the Cudahy truck complied with the provisions of N.R.S. 484.400, Subsection 1, the "high-beam" would be of such intensity as to reveal

persons and vehicles at a distance of, at least, 350 feet. This contention of Appellants is simply without merit, as the violation of the ordinance did not exist; there is no negligence per se.

On the other hand, there is no question of Bailey's violation of N.R.S. 484.290 and N.R.S. 484.370 which requires that trucks parked on a highway, or adjacent thereto, display lights visible for a distance of 500 feet.

B. Consideration under the doctrine of range and vision.

We admit that Nevada has adopted the so-called "Range of Vision Rule", as announced in the cases cited in Appellants' Brief. However, in reading the cases, it is apparent that Nevada does not accept the strict doctrine that a violation of this rule constitutes negligence or that of contributory negligence as a matter of law. A reading of these cases will reveal that Nevada, on the other hand, follows the more recent, and we believe better, reasoning that the rule serves as a guiding factor in determining whether the motorist exercises due care as to speed and control in light of all circumstances. It will be noted in each of the Nevada cases that there was an instruction submitted to the jury, which was considered along with all other instructions, to determine either the matter of negligence or contributory negligence. This matter is treated

in Blashfield Automobile Law and Practice, Third Edition, Volume 2, Section 105.37.

We are particularly impressed with the statements contained in Morehouse v. City of Everett, 252 P. 157, 160, 161; 141 Wash. 399; 58 A.L.R. 1482:

"To hold that one is, as a matter of law, guilty of contributory negligence in not, under all circumstances, seeing whatever his lights may disclose, would be to practically nullify the statutes which require red lights to be carried upon automobiles and to be placed upon obstructions in the streets or roads; or, at least, to encourage travelers on the roads, or those placing obstructions therein, not to comply with the law in those respects, for, under the rule contended for, a disobedience of the law with regard to red lights would not entail any evil consequences." Also in the North Carolina case of U.S. v. First-Citizens Bank & Trust Co., C.A.N.C., 208 F. 2d. 280

"The 'outrunning headlights rule' under North Carolina law that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within distance that objects can be seen ahead of it does not preclude examination of alleged negligence of driver under rule of reasonable prudence or provide a bomb-proof haven of refuge for

one who has left an unlighted death trap on a public highway in the darkness of the night." (Underscoring ours).

Dodd, in the operation of the Cudahy truck, was proceeding at approximately the speed limit. He had dimmed his lights in the face of the lights of the P.M.T. truck. According to the testimony of Morrow, the Paxton trailer was unlighted for, at least, one-half minute during this period of time. According to Dodd's own testimony, it was unlighted during the entire period. Proceeding at the rate of speed of 57 miles per hour, the Cudahy truck would have covered the distance (one mile) from the top of the hill to the scene of the collision in little over one minute. That upon observing the Paxton trailer Dodd immediately applied his brakes. In this regard we must recognize reaction time and the beginning of the skid marks 113 feet from the point of impact; that there was insufficient time for Dodd to do anything other than apply his brakes. These facts were taken into consideration by the District Judge, who found the Cudahy driver Dodd to be free of contributory negligence. This part of Appellants' argument should also be resolved in favor of the Appellee.

The statement at the end of Appellants' Brief in relation to the remarks of the District Court should be read in its entirety beginning with line 19, page 158, of the Transcript, through line 7

of page 159, the intent being to compliment the attorney for the Appellants, and, perhaps, to soften the effect of an adverse judgment in favor of the Appellee.

CONCLUSION

The Court is urged that the judgment of the District Court be affirmed.

Dated, Winnemucca, Nevada
July 19, 1967

RESPECTFULLY SUBMITTED,
Peter Echeverria, Esq.
555 South Center Street
Reno, Nevada
and
James A. Callahan, Esq.
Professional Building
Winnemucca, Nevada

By James A. Callahan
Of Counsel

Attorneys for Appellee

CERTIFICATE OF COUNSEL

We certify that, in connection with the preparation of this brief, we have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Peter Echeverria, Esq.
555 South Center Street
Reno, Nevada

James A. Callahan, Esq.
Professional Building
Winnemucca, Nevada

By James A. Callahan
Of Counsel

Attorneys for Appellee.

NO. 21654

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM EDWARD EARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

WM. MATTHEW BYRNE, JR.,
United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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United States Attorney,
ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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IN THE UNITED STATES COURT OF APPEALS

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

On April 27, 1964, appellant was convicted upon his plea of guilty to an indictment charging him with violating Title 18, United States Code, Section 2113(a). He was sentenced to imprisonment for a period of 20 years by the Honorable Charles H. Carr, in the United States District Court in Los Angeles, California [C. T. 3]. 1/

On September 15, 1966, appellant filed a Motion pursuant

1/ "C. T." refers to Clerk's Transcript of Record on Appeal.

to Section 2255 of Title 28, United States Code, claiming (1) that his guilty plea was improperly coerced and is void because the United States Attorney "reneged" on his promise of leniency, and (2) that he was denied counsel following his arrest and statements subsequently obtained from him "were used by the Government to deprive petitioner of a fair trial, fair plea, and fair sentence" [C. T. 2-8].

On December 19, 1966, Judge Carr's order was entered, denying the appellant's motion under Section 2255 [C. T. 8-20], and on January 18, 1967, Judge Carr authorized the prosecution of this appeal in forma pauperis, noting in his order that his order denying appellant's motion under Section 2255 contained "the portions of the reporter's transcript which will be needed to decide the issues presented by his appeal" [C. T. 21-22].

On January 19, 1967, the appellant filed Notice of Appeal and Designation of Contents [C. T. 36-37].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's motion pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTES INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was made pursuant to the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under sentence of a court established by Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."
>
> * * *
>
> "An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

STATEMENT OF FACTS

The Order Denying Motion under Section 2255, Title 28, United States Code, sets out the pertinent factual background of

this case, as follows:

"The Assistant United States Attorney who was assigned to the case has filed an affidavit in which he asserts that no promises of any kind were ever made to the petitioner.

"When petitioner first appeared in court for arraignment on arraignment day, the petitioner was advised as follows: that every person charged with an offense is entitled to a jury trial, to be represented by counsel, and to have witnesses subpoenaed in his behalf; that, if a defendant did not have funds and was financially unable to employ counsel, the court could and would appoint an attorney to represent him.

"When counsel for petitioner appeared with him and stated to the court that petitioner wished to change his plea from not guilty to guilty, the reporter's transcript discloses that the following occurred:

" 'THE CLERK: William Edward Early, are you the defendant William Edward Early?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE CLERK: Do you now withdraw your plea of not guilty which you have heretofore entered to the charges in the indictment?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

" 'THE CLERK: Now the indictment charges that on or about March 2, 1964, in Los Angeles County, California, you by force and violence and by intimidation, knowingly and wilfully took $4,932.00 belonging to and in the care, custody, control and possession of the United California Bank, Florence and Central Branch, a bank whose deposits were insured by the Federal Deposit Insurance Corporation, and that in committing the offense charged you assaulted and put in jeopardy the life of Jennie Johnson, a teller; do you understand that charge?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE CLERK: What is your plea to that charge? Are you guilty or not guilty?

"DEFENDANT WILLIAM EDWARD EARLY: Guilty.

"THE CLERK: Do you plead guilty to the offense because you did commit it?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: In other words, it is correct that you did do the acts as read to you by the clerk?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: Has anyone promised you anything to enter this plea?

"DEFENDANT WILLIAM EDWARD EARLY: No, sir.

"THE COURT: Has anyone threatened you in any way at all?

"DEFENDANT WILLIAM EDWARD EARLY: No, sir.

"THE COURT: Have you been told what the penalty could be?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: I am sorry, you will have to put it in words, don't nod your head.

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: You realize you can get 25 years on this charge?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: And nothing has been said to you by anyone that leads you to believe that any kind of promises have been held out to you to enter this plea?

"DEFENDANT WILLIAM EDWARD EARLY: No, sir.

"THE COURT: You are doing it of your own free will and accord?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: Because you did it?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir." (p. 4, line 20 to p. 6, line 20).' "

IV

ARGUMENT

A. APPELLANT WAS CHARGED WITH, AND WAS AWARE THAT HE WAS CHARGED WITH, ROBBING A FEDERALLY INSURED BANK.

In appellant's opening brief he states:

"Appellant respectfully contends that the district court was without jurisdiction of the subject matter in his case -- was without jurisdiction to accept a plea and without jurisdiction to impose a sentence. This is true because the Government has failed to establish the commission of an offense against the laws of the United States." [Appellant's Opening Brief, p. 5]

Appellant further states:

"Consequently, in the case presently commanding our attention, there is no testimony or other evidence that appellant robbed a Federally insured bank, a pawnshop or a neighborhood fruit stand. . . . This is also true if the Indictment fails to state that such bank was Federally insured." [Appellant's Opening Brief, p. 6]

Appellant has not brought the indictment before this court by designation, and the issue was never raised below. However, the Reporter's Transcript, as quoted by Judge Carr in his order denying appellant's 2255 motion indicates the following:

"THE CLERK: Now the indictment charges that on or about March 2, 1964, in Los Angeles County, California, you by force and violence and by intimidation, knowingly and wilfully took $4,932.00 belonging to and in the care, custody, control and possession of the United California Bank, Florence and Central Branch, a bank whose deposits were insured by the Federal Deposit Insurance Corporation, and that in committing the offense charged you assaulted and put in jeopardy the life of Jennie Johnson, a teller; do you understand that charge?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE CLERK: What is your plea to that charge? Are you guilty or not guilty?

"DEFENDANT WILLIAM EARLY: Guilty."

[C. T. p. 10, Emphasis added by appellee.]

Thus, from the information before this Court, it is apparent that Federal jurisdiction existed. Furthermore, if there was any question as to whether the crime was committed within the jurisdiction of the District Court, the issue should have been raised there. At this later stage, unless it appears affirmatively from the record that the court was without jurisdiction, the judgment is presumptively valid. Archer v. Heath, 30 F. 2d 932 (9 Cir. 1929); Markham v. United States, 215 F. 2d 56 (4 Cir. 1954).

B. THE DISTRICT COURT PROPERLY REFUSED TO HOLD A HEARING ON THE QUESTION OF WHETHER APPELLANT'S GUILTY PLEA WAS COERCED AND VOID BECAUSE THE U. S. ATTORNEY "RENEGED" ON HIS PROMISES, AND BECAUSE CERTAIN STATEMENTS HAD BEEN OBTAINED FROM THE DEFENDANT IN THE ABSENCE OF COUNSEL.

1. No Hearing Was Necessary on Petitioner's Contentions of Promises and Coercion.

The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every

Section 2255 proceeding, or that a hearing need always be held. Whether a prisoner should be produced and a hearing held depends upon the issues raised by the particular case, for Section 2255, Title 28, United States Code, provides that no hearing is necessary where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Cf. United States v. Fleenor, 177 F. 2d 482 (7 Cir. 1949).

In the instant case, no hearing was necessary because the motion, records and files before the District Court conclusively showed that appellant was entitled to no relief. As Judge Carr stated, there are at least five reasons why this was so:

> " . . . First, the allegations are vague, conclusionary, and are not sufficient to require a hearing. Second, there are no allegations that any alleged admissions or confession influenced petitioner to enter his plea of guilty. Third, the record shows that the plea made in open court was voluntarily and understandingly made. Fourth, the plea in open court, with his attorney present and under all the circumstances, was clearly a voluntary confession and admission of the crime. Fifth, the defendant's conduct at the time of plea shows a deliberate waiver of any claimed constitutional violations which may have occurred prior to the plea." [C. T. 12].

Thus, the District Court properly held, in effect, that the records

and files conclusively and expressly belied the prisoner's claim. Cf. Machibroda v. United States, 368 U.S. 487, 495 (1962).

In similar situations, many courts have held that, "Where, as in the instant case, the factual allegation is contradicted by the record made by the movant during the criminal proceeding, he is entitled to no relief and his motion may be dismissed without a hearing." Lynott v. United States, 360 F.2d 586, 588 (3 Cir. 1966). See also Semet v. United States, 369 F.2d 90 (10 Cir. 1966), and Putnam v. United States, 337 F.2d 313 (10 Cir. 1964).

Likewise, in the case of Burgett v. United States, 237 F.2d 247, 251 (8 Cir. 1956), cert. den. 352 U.S. 1031, 77 S. Ct. 596, the opinion pointed out that,

> "The court meticulously questioned the appellant as to his understanding of the charge against him. He and his counsel had every opportunity to tell the court of any threats or coercion used against him. . . . A defendant, having been represented by competent counsel, having been given every opportunity and right afforded by the law and having entered a plea of guilty, may not, without some reasonable basis, come into court years later and repudiate his prior plea. It is not the intent of Section 2255 nor the meaning of United States v. Hayman to require a hearing upon the mere assertion that a prior plea was false."

Where a defendant states in open court, with his attorney present, that his plea of guilty is made without promise or coercion, such statement ought to be binding upon the defendant. Otherwise, any defendant so convicted could later claim that someone connected with the Government who is now deceased or unavailable, made certain promises and threats which coerced the defendant's plea. In such a case, the prisoner's allegations would stand uncontradicted, and the Government would then be placed in the unfair position of having to prove an offense long after the time of indictment when it was originally prepared to do so.

As Judge Carr pointed out in the order appealed from here,

> "In the Central District of California, formerly the Southern District of California, for several years the yearly criminal case load has exceeded 1,200 cases, in about eighty per cent of which or approximately 1,000 cases pleas of guilty are entered. These cases could result in a bumper crop of motions under Section 2255. Frivolous petitions for writs and motions under Section 2255 have been a severe burden." [C. T. 17].

It is submitted that where, as in this case, a defendant pleads guilty upon being advised of his constitutional rights by the court, while being represented by counsel, and after assuring the court that he has not been threatened in any way, that he has received no promises of any kind, that he understands the maximum

sentence that might be imposed, and that he is pleading guilty because he is guilty; and that where, as here, the Assistant United States Attorney handling the case at the time had filed an affidavit denying the prisoner's charges; and that where, as here, there are before the court no circumstances whatsoever as would lend credence to the prisoner's belated assertion that he lied to the court at the time of conviction and was nowtelling the truth about the voluntariness of his plea -- that in such a situation a court is justified in holding that a conclusive showing has been made that the prisoner is entitled to no relief.

2. No Hearing Was Necessary On Petitioner's Contentions of Confessions Obtained in Absence of Counsel.

Appellant contends that his confession prior to plea, "wrung from the accused in the absence of counsel, renders the instant judgment of conviction constitutionally void" (appellant's opening brief, p. 9).

As the District Court order pointed out, "Petitioner's contentions respecting the lack of counsel cannot be sustained since he was sentenced on April 27, 1964, before Escobedo v. Illinois, 378 U.S. 478, became effective." [C. T. 19]. Thus, a conclusive showing existed that the petitioner was entitled to no relief, in regard to these contentions.

But even had petitioner's case occurred after Escobedo, it

would seem that the subsequent securing of counsel by the defendant, who presumably analyzed the case prior to defendant's entry of plea, should foreclose unlitigated questions under the Fourth, Fifth and Sixth Amendments, especially where, as here, the petitioner makes no showing, other than his own sudden recollection, which would indicate a possible violation of his constitutional rights.

The requirements of an orderly society and the administration of justice should permit the District Court to make a conclusive finding without a hearing that a petitioner is entitled to no relief where, as here, the record and files and Reporter's Transcript so clearly indicate that the asserted constitutional violations, if any there truly be, have been knowingly and intelligently waived.

V

CONCLUSION

A review of the record and order denying appellant's motion discloses no error and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

WILLIAM J. GARGARO, JR.,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.

NO. 21655

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOM PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,
CRAIG B. JORGENSEN,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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Chief, Criminal Division,
CRAIG B. JORGENSEN,
Assistant U. S. Attorney,

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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NO. 21655

IN THE UNITED STATES COURT OF APPEALS

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TOM PARKER,

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On September 29, 1965, the Federal Grand Jury for the Southern District of California returned a two-count indictment against the appellant charging him with forging and uttering a United States Treasury check [C. T. 2-3]. 1/

Pursuant to a plea of not guilty, trial by jury commenced on July 11, 1966 [C. T. 4]. The jury returned a verdict of guilty on both counts on July 12, 1966 [C. T. 5-6].

1/ "C. T." refers to Clerk's Transcript.

Count One charged:

On or about March 15, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant Tom Parker, knowingly and willfully forged on United States Treasury Check number 99, 355, 807, dated February 26, 1965, in the amount of $430. 60, the endorsement and signature of the payee, B. Carter, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

Count Two charged:

On or about March 15, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant Tom Parker, with intent to defraud the United States, uttered and published as true United States Treasury Check number 99, 355, 807, dated February 26, 1965, in the amount of $430. 60, bearing the purported endorsement of the payee, B. Carter, which endorsement was forged, as the defendant then and there well knew.

On September 21, 1966, Judge Albert Lee Stephens committed appellant to the custody of the Attorney General for concurrent terms of three years on each count, on the condition that appellant is to be confined in a jail-type institution for a period of three months on each count, to begin and run concurrently; the execution of the remainder of the sentence was suspended and appellant was placed on probation for three years [C. T. 7].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based upon Title 28, United

States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 495, provides:

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited --

"Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

III

QUESTIONS PRESENTED

1. Were appellant's Fifth Amendment rights violated by the admission into evidence of a voluntarily executed handwriting exemplar?

2. Was the evidence sufficient to support the verdict?

IV

STATEMENT OF FACTS

On March 15, 1965, appellant Tom Parker, presented a Government check to Judge Anderson, a clerk in the Memo Liquor Store, Compton, California [R. T. 18-19]. [2/] Parker occasionally visited the store, and Anderson recognized him. Anderson, however, did not know Parker well, and knew him only as "Tom" [R. T. 28]. Anderson initialed the check and presented it to witness Richard McCray for payment [R. T. 57], after Parker had endorsed and placed an address on the back of it [R. T. 26]. In exchange for the check, McCray issued three money orders to Parker, deducted the amount of a small purchase, and handed Parker some cash [R. T. 62]. Payment of the check in cash would have substantially reduced the store's fund of cash for change and cashing checks [R. T. 19]. Later, Parker returned and Anderson cashed one of

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2/ "R. T." refers to Reporter's Transcript.

the money orders [R. T. 22-24]; a second money order was also cashed at the Memo Liquor Store [R. T. 25, 48]; the record does not reveal where the third money order was negotiated.

A handwriting expert, Sgt. William Bowman, testified that in his opinion some of the handwritings on the check, two of the money orders, and the handwriting exemplar were written by the same person [R. T. 102-103].

It was stipulated that the payees of the check did not negotiate or endorse it, or authorize Parker to do so [R. T. 16-17]. The money orders were numbered consecutively, and all were issued by the Memo Liquor Store [R. T. 21-22, 58-61]. One money order was made payable to Tom Parker from Edna Parker, 111 Millet Street, Eunice, Louisiana. Edna Parker is Tom Parker's mother [R. T. 134]. Another money order bears the address of 722 Santa Rita Street, Compton, California, the address of Parker's girl friend [R. T. 134].

Parker testified that he had lost his wallet two months prior to March 15, 1965; that the wallet was lost in Palos Verdes Hills, California; and that identification cards, including his mother's name and address, were in the wallet [R. T. 133, 135-136].

When Parker was arrested by Secret Service Agent Frank Slocum, he was advised of his right to remain silent, that any statement made could be used against him in a court of law, and that an attorney would be contacted for him, if he desired [R. T. 91]. Parker was then taken before a United States Commissioner, where he was arraigned. As he waited to be arraigned by the Commissioner,

Parker voluntarily executed a handwriting exemplar, at the request of Agent Slocum [R. T. 91]. Slocum told Parker that the exemplar would be submitted to a handwriting expert, and Parker replied that the experts would find the writing on the check was not his [R. T. 91-92]. Parker testified that he filled out Exhibit No. 5 freely and voluntarily [R. T. 133].

V

ARGUMENT

A. A VOLUNTARILY SUBMITTED HANDWRITING EXEMPLAR IS NOT WITHIN THE FIFTH AMENDMENT PROSCRIPTION OF COMPULSORY SELF-INCRIMINATION.

The admission of Exhibit 5 (handwriting exemplar) into evidence, was not compulsory self-incrimination as to appellant. Appellant was neither compelled to make a statement, nor to execute the handwriting form. He steadfastly asserted his innocence at the time the form was executed, and testified that he wrote Exhibit 5 freely and voluntarily [R. T. 91-92, 133].

Appellant relies upon Miranda v. Arizona, 384 U. S. 201 (1966), Escobedo v. Illinois, 378 U. S. 478 (1963) and Massiah v. United States, 377 U. S. 201 (1963). In each of these cases the defendant was compelled to make incriminatory statements, which were admitted against him at trial. This case does not involve the admission of a statement made by the defendant. Moreover, Parker

was told by Agent Slocum that Exhibit 5 would be submitted to a handwriting expert, to which Parker responded by asserting his innocence and his confidence that the expert would exonerate him [R. T. 91-92]. Parker then freely executed the exhibit [R. T. 133]. Manifestly, Parker was aware of the purpose, nature, and importance of the handwriting exemplar; he knew he was free to refuse to execute it. On these facts, the above-cited cases are inapposite, since no compulsion is present.

In Schmerber v. California, 384 U. S. 757, 764 (1966), the Supreme Court indicated that the Fifth Amendment offers no protection against compulsion to write or speak for identification, since the privilege bars compelling "communication" or "testimony". Thus, even if defendant had been compelled to execute the exemplar, it is arguable that no constitutional right would have been violated. In any event, the handwriting exemplar was voluntarily given after defendant had been informed of his rights.

A voluntarily executed handwriting exemplar is not embraced by the Fifth Amendment privilege. This principle has been enunciated by several Circuit Courts of Appeal in carefully reasoned opinions.

In United States v. Acosta, 369 F. 2d 41 (4th Cir. 1966), a conviction of forging and uttering a Government savings bond was affirmed. Defendant had voluntarily furnished handwriting exemplars after he was warned that he need not do so. The Court held that since the exemplar was given voluntarily, it was admissible and that it need not, therefore, decide the question of whether

compelling a handwriting exemplar is a violation of his privilege of self-incrimination.

A similar holding was handed down by the Second Circuit Court of Appeals in United States v. Serao, 367 F. 2d 347 (2nd Cir. 1966). Introduction into evidence of a handwriting exemplar, procured from defendant after he had been arraigned on a gambling charge, did not violate defendant's Fifth Amendment privileges because the handwriting sample was used merely as a standard for identification and not to communicate information.

Finally, this Court has held that the privilege against self-incrimination is limited to incriminating communications. Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966), holds that compelling a defendant to appear at a line-up, where he is required to speak certain phrases in a loud and soft voice and walk in a certain manner, is not a violation of his Fifth Amendment rights. An exhaustive review of the authorities and the constitutional standards applicable to the privilege against self-incrimination is set forth at pages 935-937. In view of that discussion, further argument on this question is inappropriate and unnecessary.

B. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

In considering the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the Government, together with all reasonable inferences which may

be drawn from that evidence. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942). If the Court finds substantial evidence, it must presume the findings of the trier of fact to be correct and sustain the judgment. Noto v. United States, supra; Ingram v. United States, 360 U.S. 672, 678 (1959).

That the credibility of a witness is exclusively the province of the jury can no longer be challenged. Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950). Prior inconsistent statements, demeanor, assertions, and explanations of the witnesses were properly submitted to the jury for determination. Obviously, the jury chose to believe the Government witnesses. This Court will not substitute its judgment for that of the jury. Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966).

As pointed out in paragraph IV, defendant's denial of the offense and his explanation of the lost wallet was before the jury. Two Government witnesses positively identified him as the person who presented the check for encashment; another testified that Parker's handwriting was on the Government check. The names and addresses on the money orders were specially within Parker's knowledge, and the money orders, which were numbered sequentially, were issued by the Memo Liquor Store, where two of the Government witnesses clerked. These facts are ample to support the jury's verdict under the above-cited authorities.

Since this Court has indicated that it will not interfere with

the jury's determination of the witnesses' credibility, or its resolution of conflicts in evidence, United States v. Muns, 340 F. 2d 851 (9th Cir. 1965), cert. denied, 381 U. S. 913 (1965), Appellant cannot now relitigate the issues of fact decided at the trial.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.,
United States Attorney,

ROBERT L. BROSIO,
Assistant U. S. Attorney,
Chief, Criminal Division,

CRAIG B. JORGENSEN,
Assistant U. S. Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN

NO. 21659

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United States Attorney
ROBERT L. BROSIO,
Assistant U. S. Attorney
Chief, Criminal Division,
CRAIG B. JORGENSEN
Assistant U. S. Attorney

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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United States Attorney
ROBERT L. BROSIO,
Assistant U. S. Attorney
Chief, Criminal Division,
CRAIG B. JORGENSEN
Assistant U. S. Attorney

600 U. S. Court House
312 North Spring Street
Los Angeles, California 90012

Attorneys for Appellee,
United States of America.

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APPELLEE'S BRIEF

I

JURISDICTION

The Federal Grand Jury returned indictment No. 34469 on January 13, 1965, charging appellant and Albert David O'Day with a violation of Title 18, United States Code, Sections 3 and 2113(a). Appellant was convicted on February 10, 1965 before the United States District Court for the Southern District of California, the Honorable Charles C. Carr presiding, upon a jury verdict of guilty on Counts III and IV. No appeal from this conviction was taken. Appellant filed a Motion to Vacate Judgment of Conviction No. 66-1425-CC, on September 1, 1966, [C. T. 2][1/] which was

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1/ "C. T." refers to Clerk's Transcript.

denied by the court without a hearing on December 10, 1966 [C. T. 31]. Timely Notice of Appeal was filed by appellant on January 12, 1967 [C. T. 49]. Leave to appeal in forma pauperis was granted on March 24, 1967.

The District Court had jurisdiction of the motion pursuant to Title 28, United States Code, Section 2255. This court has jurisdiction on this appeal pursuant to Title 28, United States Code, Sections 2253, 1915, 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 3:

"Accessory after the fact

Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; . . . ."

Title 18, United States Code, Section 2113(a):

"Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny --

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 28, United States Code, Section 144:

"Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is

pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith."

III

STATEMENT OF FACTS

The following is taken from the trial memorandum of the government in Case No. 34469 since no transcript has been prepared and the appellant's brief does not contain such a statement. Appellant was a delivery truck driver for the Essex House of Furniture in December, 1964. Albert David O'Day was his assistant. On December 17, 1964, Grimes drove the truck into the parking lot behind the Bank of America's Panorama City Branch. O'Day entered the bank, presented a demand note, and robbed a teller of approximately $730.00. He ran out of the bank toward

the truck. As he approached, Grimes told him a witness had seen him and instructed O'Day to keep running. Grimes then drove away and picked up O'Day a few blocks from the bank. O'Day and Grimes split the proceeds of the robbery.

On December 23, 1964, O'Day and Grimes drove to the Sherman Oaks Branch, Bank of America. O'Day entered the bank by the back door, and Grimes by the front door. Again using a demand note, O'Day robbed a teller of approximately $1,676.00. O'Day and Grimes then fled the bank.

IV

QUESTIONS PRESENTED

1. Did the court err in determining that the Affidavit of Bias was legally insufficient to establish personal bias and prejudice?
2. Is the admissibility of a confession a ground upon which to collaterally attack a conviction under Section 2255? If so, was it error to admit defendant's confession?
3. Was it error to determine that appellant's moving papers were legally insufficient to require an evidentiary hearing, when the ground asserted was knowing use of perjured testimony by the prosecution?
4. May appellant raise the issue of frustration of

his right to appeal for the first time in this court? If so, does the record support his contention?

V

ARGUMENT

A. APPELLANT'S AFFIDAVIT OF BIAS WAS LEGALLY INSUFFICIENT TO ESTABLISH PERSONAL BIAS AND PREJUDICE OF THE TRIAL JUDGE.

The affidavit filed by the appellant in the lower court [C. T. 11-12] alleged no facts from which a reasonable mind might fairly infer bias or prejudice and was therefore legally insufficient to establish personal bias or prejudice.

Lyon v. United States, 325 F. 2d 370 (9th Cir. 1963);

Willenbring v. United States, 306 F. 2d 944 (9th Cir. 1962);

Price v. Johnston, 125 F. 2d 806 (9th Cir. 1942).

Notwithstanding appellant's contention, it is fundamental that the trial judge must first determine the sufficiency of the affidavit of bias and prejudice before a determination as to the truth of the allegations is made.

Berger v. United States, 255 U. S. 22 (1921);

Craven v. United States, 22 F. 2d 605 (1st Cir., 1927).

"The provision in the statute [requiring

facts and reasons] is meaningless, unless construed to require the plaintiff, under oath, at least to assert facts from which a sane and reasonable mind may fairly infer bias or prejudice."

Keown v. Hughes, 265 Fed. 573, 577 (1st Cir. 1920);

Accord: Scott v. Beams, 122 F. 2d 777 (10th Cir. 1941).

The affidavit filed by petitioner contains no factual allegations of sufficient particularity from which one might reasonably infer bias or prejudice of the trial judge. It merely alleges that the trial judge is prejudiced against bank robbers and Negroes, including the petitioner. [C. T. 11-12]. The affidavit is insufficient and the court did not err in refusing to transfer the case.

B. ADMISSIBILITY OF A CONFESSION CANNOT BE ASSERTED AS A GROUND FOR COLLATERAL ATTACK ON A CONVICTION.

Section 2255 of Title 28, United States Code cannot take the place of an appeal. It may not be the vehicle for relitigating questions which were or should have been raised on direct appeal.

Thornton v. United States, 368 F. 2d 822 (D. C. Cir. 1966);

United States v. Marchese, 341 F. 2d 782 (9th Cir. 1965);

Black v. United States, 269 F. 2d 38 (9th Cir. 1959), cert. denied, 361 U. S. 938 (1959)

This principle was succinctly stated in Hodges v. United States, 282 F. 2d 858 (D. C. Cir. 1960), cert. dismissed, 368 U. S. 139 (1961).

> "Absent a showing of a real miscarriage of justice, I think we must hold to the general rule that the admission of a confession at a plenary trial is not subject to attack under Section 2255 on the ground that the confession was coerced, or was given during a period of illegal detention. Allowing such collateral attacks to be made would permit the reopening of many of the most hotly contested criminal trials -- at a time when recollections may have dimmed and witnesses may have disappeared." 282 F. 2d at 860.

Accord: Campbell v. United States, 355 F. 2d 394 (7th Cir. 1966), cert. denied, 385 U. S. 922 (1966); Smith v. United States, 187 F. 2d 192, 197 (D. C. Cir. 1950), cert. denied, 341 U. S. 927 (1951).

Moreover, relief under Section 2255 will be denied where there was a knowing or calculated decision not to appeal. Fay v. Noia, 372 U. S. 391 (1963); Sunal v. Large, 332 U. S. 174 (1947). The transcript discloses that petitioner and his appointed counsel

chose not to appeal, but to move for a modification of sentence under Rule 35, Federal Rules of Criminal Procedure. [C. T. 38].

C. PETITIONER'S CONFESSION WAS VOLUNTARILY GIVEN AND THEREFORE PROPERLY ADMITTED INTO EVIDENCE

The issue of voluntariness was first considered by the court outside the presence of the jury [C. T. 32]. It was then submitted to the jury under careful instructions. [C. T. 32].

Absent a strong factual showing by petitioner from the record that the confession was the end product of coercion or coercive influences, see Davis v. North Carolina, 384 U. S. 737 (1966), this court will not interfere with the determination by the lower court and the jury. See Diaz-Rosendo v. United States, 357 F. 2d 124 (9th Cir. 1966). Petitioner has never alleged facts to support his contention; his motion for relief merely stated the conclusion that the confession was involuntary. [C. T. 4]. Clearly, no evidentiary hearing was necessary based upon this bald assertion, particularly in view of the complete hearing afforded to petitioner on this issue at the trial. Dodd v. United States, 321 F. 2d 240 (9th Cir. 1963). Furthermore, petitioner was given the opportunity to amend his petition and file additional affidavits with the lower court, but refused to do so. [C. T. 36-37].

Additionally, petitioner apparently contends that his con-

fession was inadmissible as a matter of law, because it was given in the absence of counsel. A voluntary confession made without counsel is not inadmissible in every case. United States v. Robinson, 354 F. 2d 109 (2nd Cir. 1965); Mitchell v. Stephens, 353 F. 2d 129, 141 (8th Cir. 1965). Since petitioner does not allege, nor does the record reflect, that he requested and was denied counsel prior to questioning, Escobedo v. Illinois, 378 U. S. 478 (1964), is inapposite. See Von Schmitt v. United States, 366 F. 2d 773 (9th Cir. 1966).

D. WAS IT REVERSIBLE ERROR TO DETERMINE THAT THE PETITION WAS LEGALLY INSUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING ON THE ISSUE OF KNOWING USE OF PERJURED TESTIMONY?

The trial court considered the affidavits submitted by petitioner [C. T. 8, 9] and the Assistant United States Attorney [C. T. 24-25], and concluded that an evidentiary hearing was unnecessary. [C. T. 36]. Since petitioner's showing consisted of only vague and conclusionary assertions, which failed to particularize the claimed perjured testimony, or its materiality, the petition was legally insufficient.

Marcella v. United States, 344 F. 2d 876 (9th Cir. 1965), cert. denied, 382 U. S. 1016 (1965);

Holt v. United States, 303 F. 2d 791 (8th Cir. 1962);

United States v. Jenkins, 281 F. 2d 193 (3rd Cir. 1960).

The court in Marcella, supra, delineated the necessary facts that a petitioner must show in order to vacate a sentence on this ground:

> "[T]he movant must show that the testimony was perjured and that the prosecuting officials knew at the time such testimony was used that it was perjured. ... In addition, the perjured testimony said to have been knowingly used must be particularized definitely." 344 F. 2d at 880

The facts upon which petitioner grounds this contention are contained in the affidavit of Albert David O'Day. [C. T. 8-9]. O'Day failed to particularize the perjured testimony. He merely states that he "added a little yeast" to his testimony that that he "thinks" the Assistant United States Attorney knew he was not telling the truth. [C. T. 9] These vague and conclusionary assertions are patently insufficient under the test set forth in Marcella.

The Assistant United States Attorney, Kevin O'Connell, submitted an affidavit which denies that he made any promises of immunity or threats to O'Day, and states that at no time did he believe O'Day's testimony to be perjurious. [C. T. 24-25].

Petitioner was allowed 60 days in which to amend his petition to set forth specifically the alleged perjurious testimony and to file additional affidavits. [C. T. 36-37]. He failed to avail himself of the opportunity.

In Machibroda v. United States, 368 U. S. 487 (1961), the

court held that it was error to decide petitioner's motion under Section 2255, which alleged facts to show that his guilty plea was coerced, without an evidentiary hearing. The court added, however:

> "What has been said is not to imply that a movant must always be allowed to appear in the district court for a full hearing if the record does not conclusively and expressly belie his claim, no matter how vague, conclusory, or palpably incredible his allegations may be. The language of the statute does not strip the district courts of all discretion to exercise their common sense."
> 368 U. S. at 495.

This court has indicated that under the statute the trial court may deny a motion for relief under Section 2255 without granting an evidentiary hearing, even though the facts cannot be conclusively determined from the record. That situation was before this court in Dodd v. United States, 321 F. 2d 240 (9th Cir. 1963), where defendant alleged ineffective assistance of counsel and knowing use of perjured testimony by the prosecution. The court said that defendant's bald legal conclusions with no supporting allegations of fact were insufficient. The trial court had the power to deny the motion as to these grounds without an evidentiary hearing.

In considering the propriety of denying such a motion without

a hearing, Judge Prettyman wrote:

> "A motion which shows no ground for granting it conclusively shows it will be denied; conclusively shows no relief will be granted. . . . If such a movant proved all the facts he alleges, he would get no relief; . . ."
>
> Mitchell v. United States, 249 F. 2d 787, 794 (D. C. Cir. 1958), cert. denied, 358 U. S. 850 (1958). [Emphasis added]

Reviewing the allegations of appellant's moving papers in the court below, it becomes apparent that he has not alleged facts that would entitle him to relief. O'Day alleges promised immunity which was admittedly never received. It further alleges that he "added a little yeast" to his testimony and that he "thinks" the Assistant United States Attorney knew that his testimony wasn't entirely true. The vagueness of "adding a little yeast" is self-evident, so too is the vague and conclusory nature of the alleged knowledge on the part of the Assistant United States Attorney.

Under these circumstances, a hearing would be a useless waste of time and money. Moreover, serious consequences to the administration of law would follow if the entire prison population could demand a second trial by the simple expedient of alleging vague, conclusory, and palpably incredible grounds for relief which cannot be conclusively determined from the records and files of the case. See Young Hee Chong v. United States,

344 F. 2d 126 (9th Cir. 1965); Malone v. United States, 299 F. 2d 254 (6th Cir. 1962); United States v. McNicholas, 298 F. 2d 914 (4th Cir. 1962), cert. denied, 369 U. S. 878 (1962); Mitchell v. United States, supra.

E. APPELLANT MAY NOT RAISE ERRONEOUS FRUSTRATION OF THE RIGHT TO APPEAL FOR THE FIRST TIME IN THIS COURT.

Appellant having failed to raise the alleged frustration of his right to appeal in the lower court cannot be heard to raise that issue on this appeal. Smith v. United States, 287 F. 2d 270, 273 (9th Cir. 1961), cert. denied, 366 U. S. 946 (1960); Johnston v. United States, 254 F. 2d 239, 241 (8th Cir. 1958). An appellate court need not consider contentions on appeal which were not presented in the trial court. Holt v. United States, 303 F. 2d 791 (8th Cir. 1962).

This court has held repeatedly that a defendant for the first time on appeal from denial of a motion to vacate a conviction cannot raise issues that were not presented to the trial court.

E. g., Rivera v. United States, 318 F. 2d 606, 608 n. 4 (9th Cir. 1963).

Appellant's motion to the district court does not advert to this issue as a ground for relief [C. T. 3]; hence, he cannot raise the issue in this court.

F. ASSUMING APPELLANT IS ALLOWED TO RAISE THE ISSUE AS TO THE FRUSTRATION OF HIS RIGHT TO APPEAL, THE CONTENTION IS WITHOUT MERIT

It is settled that relief under Section 2255 will be denied where there was a knowing or calculated decision not to appeal.

Fay v. Noia, 372 U.S. 391 (1963);

Sunal v. Large, 332 U.S. 174 (1947);

Dodd v. United States, 321 F. 2d 240, 244-6 (9th Cir. 1963).

The record indicates that appellant was represented by counsel at arraignment and plea, trial, sentencing, and on a motion for modification of sentence. [C. T. 6]. It does not therefore support appellant's contention that he was unaware of his right to appeal; consequently, the lower court was without jurisdiction to grant appellant's motion for leave to file a notice of appeal nunc pro tunc, which was filed almost two years after entry of the judgment.

Robinson v. United States, 361 U.S. 220 (1960);

United States v. Creighton, 359 F. 2d 429 (3rd Cir. 1966);

People v. United States, 337 F. 2d 91 (10th Cir. 1964), cert. denied, 381 U.S. 916 (1964).

Rule 32(a)(2) of the Federal Rules of Criminal Procedure does not apply to appellant since that rule did not exist at the time of his sentencing. It became effective July 1, 1966; appellant

was sentenced on February 10, 1965.

Fed. Rules Cr. Proc. Supp., Rule 32, 18 U. S. C. A.

Former Rule 37(a)(2) required the court at sentencing to inform a defendant not represented by counsel of his right to appeal.

Fed. Rules Cr. Proc., Rule 37(a)(2), 18 U. S. C. A.

Some of the cases cited by appellant at page 13 of his brief set forth the rule that a defendant who is unaware of his right to appeal may assert in a collateral attack on his conviction the failure of the court of his attorney to thus inform him.

E. g., Doyle v. United States, 336 F. 2d 640 (9th Cir. 1964); Hannigan v. United States, 341 F. 2d 587 (10th Cir. 1965).

Here, however, appellant was represented by counsel during the ten-day period within which he could have filed an appeal, and throughout the proceedings in the trial court. Appellant admits that his attorney thought the best tack was to move for a modification of sentence rather than appeal. [C. T. 39]. Following his attorney's advice, appellant chose not to appeal but to seek a modification of his sentence. Appellant cannot now contend that he was unaware of his right to appeal.

VI

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the trial court should be affirmed.

Respectfully submitted,

WM. MATTHEW BYRNE, JR.
United States Attorney

ROBERT L. BROSIO
Assistant U. S. Attorney
Chief, Criminal Division

CRAIG B. JORGENSEN
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen
CRAIG B. JORGENSEN

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Appellant, v. THOMAS N. CLARK, Appellee.	)	No. 21665

Appeal from the United States
District Court for the Northern
District of California

APPELLANT'S OPENING BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

MICHAEL BUZZELL
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-0311

Attorneys for Appellant

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, Appellant, v. THOMAS N. CLARK, Appellee.	)	No. 21665

APPELLANT'S OPENING BRIEF

JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by Lawrence E. Wilson, Warden of the California State Prison at San Quentin,[1/]

1. Lawrence E. Wilson has recently been replaced by Louis S. Nelson.

respondent in the court below and custodian of appellee, Thomas N. Clark, from an order of the United States District Court for the Northern District of California. The order granted appellee's application for a writ of habeas corpus, but execution was stayed until further order of the court.

Proceedings in the State Court

Appellee was charged in an information filed on July 3, 1964, in the Superior Court of the State of California for the County of Orange with a violation of California Penal Code section 211 (robbery) (CTT 1-2).[2/] Appellant was arraigned on the same date, at which time he entered a plea of not guilty to the offense charged.

A jury trial was held September 16, 17, and 21, 1964 (CTT 6-11). The jury found appellee guilty as charged (CTT 13).

On October 15, 1964, appellee's motion for a new trial was granted (CTT 16). The second trial commenced December 14, 1964, and concluded December 16, 1964, at which time appellant was found guilty as charged in the information (CTT 20-24).

The California Court of Appeal, Fourth Appellate District, affirmed appellant's conviction in an

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2. A copy of the Clerk's Trial Transcript lodged with the District Court is lodged with this Court.

unpublished opinion, 4 Crim. No. 2181, filed December 13, 1965. The California Supreme Court denied a hearing February 9, 1966.

Proceedings in the Federal Court

Appellee in an application dated May 16, 1966, filed a petition for a writ of habeas corpus in the Federal District Court for the Northern District of California (TR 1-18). On June 1, 1966, the Honorable Albert Wollenberg issued an Order to Show Cause (TR 24). The return of the Attorney General of California was filed June 15, 1966 (TR 25).

In an order dated October 17, 1966, Judge Wollenberg issued an order granting the writ of habeas corpus, the order being stayed until further order of the court (TR 47-49). The appellant's petition for a certificate of probable cause to appeal was granted October 27, 1966, at which time a notice of appeal was filed (TR 53-54).

Appellee's application for release on his own recognizance was denied December 8, 1966. (TR 56).

Throughout the federal proceedings appellant urged that he was convicted upon perjured testimony and in violation of the rule announced in Griffin v. California, 380 U.S. 609 (1965). The District Court in granting the writ did not reach the question of perjured

testimony. The court held that the rule of Griffin was dispositive of the case (TR 47-49).

STATEMENT OF THE FACTS

The District Court decided this case upon the Reporter's Transcript of appellee's trial which was lodged with the court.[3/]

On March 8, 1964, Richard Guggenmos was working at an American Oil Company station located at 751 Baker Street in Costa Mesa, California (RTT 6-7). Guggenmos was sitting at a desk inside the station getting ready to take a pump reading and to make a money count when appellant Clark and a co-defendant, Nusser, entered the station and told Guggenmos to get into the back room. Appellant was carrying a gun (RTT 9-10). After the three had entered the back room, appellant told Guggenmos to take everything out of his pockets and to lie flat on the floor (RTT 14). One of the robbers then went outside, returning in a short time to ask where the big bills were kept. Guggenmos answered that there were no big bills but gave the robbers the key to the top of the safe (RTT 14). Approximately $70 was taken.

APPELLANT'S CONTENTION

The District Court erred in the conclusion that California's harmless error rule is inapplicable to

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3. A copy of the Reporter's Trial Transcript lodged with the District Court is lodged with this Court.

constitutional rights.

ARGUMENT

THE DISTRICT COURT ERRED IN THE CONCLUSION THAT CALIFORNIA'S HARMLESS ERROR RULE IS INAPPLICABLE TO CONSTITUTIONAL RIGHTS

At petitioner's trial the prosecution remarked as follows (RT 275):

> "Mr. Clark--number one, I would say right off the bat that he has a Constitutional right not to testify, but Mr. Clark hasn't given us the benefit of telling us whether he was or wasn't there. We don't know anything about Mr. Clark. You'll receive an instruction as to how this can be interpreted."

The trial court then instructed the jury as indicated below (CSTT 1-2).[4/]

> "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because

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4. A copy of the Clerk's Supplemental Trial Transcript lodged with the District Court is lodged with this Court.

of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the

People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." 51 CALJIC

Concededly, the comment and instruction was constitutional error. Chapman v. California, 386 U.S. 18 (1967); Griffin v. California, 380 U.S. 609 (1965). However, the District Court in granting the writ, incorrectly held that there is no constitutional rule which would be akin to the California "harmless error" rule. See opinion of District Court (TR 47-49). The Supreme Court in Chapman, supra, at page 22, stated:

"We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."

The Court then went on to hold that a constitutional error does not require reversal if the appellate court is able to declare a belief that the error was harmless beyond a reasonable doubt.

Appellant submits that the error in the instant

case is harmless beyond a reasonable doubt. First, the prosecution's comment was exceedingly brief. Second, the co-defendant who took the stand was convicted on precisely the same record. Third, the victim of the robbery positively identified appellant, both at the Orange Jail and at the trial (RTT 10, 20). And fourth, the testimony of Mrs. Lambert related the appellant's admissions to her of his perpetrating the robbery and the similarity in the description of the clothing and appearance of the robbers during the time they left petitioner's apartment, robbed the station and returned to divide the stolen cash.

In view of the foregoing, appellant submits that the District Court erred in holding that the harmless error rule does not apply to federal constitutional rights and that the error in the instant case was harmless.

CONCLUSION

We respectfully submit that this case should be remanded to the District Court for consideration in light of Chapman v. California, 386 U.S. 18 (1967) and

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for consideration of the allegation of use of perjured testimony.

Dated: June 16, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Michael Buzzell

MICHAEL BUZZELL
Deputy Attorney General

Attorneys for Appellant

SF Crim.
66/769
EB

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated June 16, 1967

Michael Buzzell

MICHAEL BUZZELL
Deputy Attorney General

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES S. PACHECO, Appellant, vs. MATTHEW CARBERRY, Sheriff, San Francisco, California, Appellee.	)	No. 21669

APPELLEE'S BRIEF

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

KARL S. MAYER
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-1851

Attorneys for Appellee.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES S. PACHECO, Appellant, vs. MATTHEW CARBERRY, Sheriff, San Francisco, California, Appellee.	)	No. 21669

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus is conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when, as in this case, a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the California State Courts

On August 19, 1964, Indictment No. 64039 was

filed in the San Francisco Superior Court charging appellant with two counts of violation of California Health and Safety Code section 11531 (sale of marijuana) and one count of violation of California Health and Safety Code section 11530.5 (possession of marijuana for sale). On September 10, 1964, appellant moved the trial court to quash a search warrant and suppress evidence obtained as the result of the execution thereof and moved to dismiss each of the charges under California Penal Code section 995. On November 27, 1964, the trial court granted the motion to dismiss one count charging violation of Health and Safety Code section 11531 and denied the motions as to the other counts. On the same date, appellant entered a plea of not guilty.

On January 12, 1965, appellant waived trial by jury and the matter was submitted on the transcript of testimony taken before the grand jury. On February 4, 1965, appellant was found guilty of one count of violation of Health and Safety Code section 11531 and one count of violation of Health and Safety Code section 11530.5.

On February 26, 1965, appellant was sentenced to the state prison for the term prescribed by law on each count with the sentences to run concurrently.

The California Court of Appeal affirmed appellant's conviction on March 17, 1966. People v. Borja and Pacheco, 1/Crim. 5038 (unpublished opinion). Appellant's petition for rehearing to the California Court of Appeal was denied on April 15, 1966. Appellant did not petition for hearing to the California Supreme Court.

On August 12, 1966, appellant filed a petition for a writ of habeas corpus with the California Supreme Court. This petition was denied without opinion on August 31, 1966.

B. Proceedings in the United States Courts.

On November 7, 1966, appellant petitioned for a writ of habeas corpus to the United States District Court for the Northern District of California, Action No. 45947, in the files of that court. Without having issued an order to show cause, the district court denied appellant's petition on November 9, 1966.

On December 7, 1966, the district court ordered there was probable cause to appeal and on December 8, 1966, appellant's notice of appeal to the Court of Appeals for the Ninth Circuit was filed.

This brief represents the first appearance of the California Attorney General in this matter in the federal courts.

SUMMARY OF APPELLEE'S ARGUMENT

The district court properly denied appellant's petition for habeas corpus for the following reasons:

I. Appellant has failed to exhaust his remedies presently available in the California state courts as to all issues raised in the petition to the district court and in this appeal except the issue of whether the affidavit in support of the search warrant was a sufficient statement of probable cause to justify issuance of the warrant.

II. The affidavit in support of the search warrant was a sufficient statement of probable cause to justify issuance of the warrant.

III. The admission into evidence of appellant's statements to the police was not error under applicable federal law.

IV. Whether appellant's conviction of violation of California Health and Safety Code section 11531 was in part based on hearsay evidence raises no federal question.

ARGUMENT

I

APPELLANT HAS FAILED TO EXHAUST HIS REMEDIES PRESENTLY AVAILABLE IN THE CALIFORNIA STATE COURTS AS TO ALL ISSUES RAISED IN THE PETITION TO THE DISTRICT COURT AND IN THIS APPEAL EXCEPT THE ISSUE OF WHETHER THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS A SUFFICIENT STATEMENT OF PROBABLE CAUSE TO JUSTIFY ISSUANCE OF THE WARRANT.

Appellant's petition to the District Court for a writ of habeas corpus attacks the validity of his conviction on several grounds, only one of which has been presented to the California state courts on collateral attack by way of a petition for a writ of habeas corpus to the California Supreme Court. A copy of this petition, filed with the California Supreme Court on August 12, 1966 in Crim. No. 10311, is attached hereto and made a part hereof, and is "EXHIBIT A."

Appellant's petition to the California Supreme Court attacked the validity of his conviction on the sole ground that the trial court committed reversible error by admitting into evidence contraband seized at his home pursuant to a search warrant which was invalid by reason of the failure of its supporting affidavit to manifest probable cause to search.

Whatever the merit of any other issues raised in

appellant's petition to the District Court, petitioner's failure to have invoked available remedies in the California state courts precluded their consideration by the court below. 28 U.S.C. § 2254.

This Court's review of the District Court's denial of appellant's petition is therefore restricted to the narrow issue of whether the affidavit in support of the search warrant (CT 38-39) is a sufficient statement of probable cause to search.

II

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS A SUFFICIENT STATEMENT OF PROBABLE CAUSE TO JUSTIFY ISSUANCE OF THE WARRANT.

The affidavit in support of the search warrant is clearly a sufficient statement of probable cause required by the Fourth Amendment to the United States Constitution to justify issuance of the search warrant. The text of the affidavit appears in the clerk's transcript on this appeal at pages 38-39.

The purpose of an affidavit is to enable the issuing magistrate to determine whether probable cause required by the Fourth Amendment is present and hence that a search warrant may properly issue. Giordenello v. United States, 357 U.S. 480, 486 (1958). Where, as here,

the affidavit includes information received from an informer not before the issuing magistrate the affidavit must inform the magistrate of two things: (1) some of the underlying circumstances from which the affiant concluded that the informant was credible or his information reliable, and (2) the underlying circumstances from which the informant concluded that the narcotics or other contraband were where he claimed they were. Aguilar v. Texas, 378 U.S. 108, 114 (1964).

The affidavit in the case at bar includes information received from two named informants, to wit, Ricco Jiminez and Frank Borja. The above standards, therefore, should be applied to the information received from each of these men. It is abundantly clear that a magistrate is justified in concluding that an informant is reliable where an affiant states that on several past occasions the informant has given information to the affiant which has proved to be accurate and has resulted in arrests and convictions. See, e.g., McCray v. Illinois, ___ U.S. ___, 35 U.S.L.Week 4261 (1967); Draper v. United States, 358 U.S. 307 (1959). The affidavit in the case at bar states that Ricco Jiminez had furnished information which had resulted in the arrest and conviction of three narcotic offenders. This statement is sufficient to justify the magistrate in concluding that Ricco Jiminez was a reliable

informant. This being so, the following information could properly be considered by the magistrate in determining whether issuance of the search warrant was justified: Frank Borja told Jiminez that he obtained the marijuana, which he had just sold to Jiminez, from James Pacheco, the occupant of 1237 Carolina Street.

There remains the question of whether the information contained in Frank Borja's statement to Jiminez is reliable and could therefore properly be considered by the magistrate in determining whether issuance of the search warrant was justified. It is axiomatic that the reliability of an informer may be established by the personal observations of the affiant. See United States v. Ventresca, 380 U.S. 102, 110-11 (1965). In the instant affidavit the affiant states his personal observations of the informant Frank Borja which tend to corroborate and establish the reliability of Borja's statement to Ricco Jiminez. Thus, the affiant personally observed Borja enter the premises at 1237 Carolina Street, leave the premises shortly thereafter, walk a short distance up the street, and sell a quantity of marijuana to Ricco Jiminez. These personal observations of the affiant constitute independent justification for the affiant and the magistrate to conclude that Borja's statement that

he got the marijuana at the residence was in fact true. The credibility of Borja's statement to Jiminez is further reinforced by the fact that the affiant personally observed Borja engage in identical conduct on each of the two sales to Jiminez on July 8 and July 14, 1964.

For the above reasons, respondent submits that the affidavit in support of the search warrant constituted a statement of probable cause which is sufficient under the Fourth Amendment to justify issuance of the search warrant. Moreover, even were the affidavit in this case deemed to be a doubtful or marginal statement of probable cause the resolution of the issue of whether the affidavit is sufficient should be largely determined by the preference accorded to warrants. United States v. Ventresca, supra at 109.

Appellant's opening brief includes the additional allegation that the affidavit and search warrant are defective because both were executed on July 22, 1964, one week after the occurrence of the conduct on which the warrant was based. Appellant argues that this time lapse of one week precludes a showing of then-existing probable cause.

Although courts have generally held that a delay of more than thirty days operates to invalidate a search warrant, the passage of less time does not necessarily

do so. Example cases are collected in Annotation, 100 A.L.R.2d 525 (1965), and Annotation, 162 A.L.R. 1406 (1946). Moreover, California Penal Code section 1534 provides that a search warrant may be executed within 10 days of its issuance and if it is not so executed the warrant is void.

The facts recited in the affidavit in the case at bar justify the magistrate's conclusion that although the most recent conduct on which the warrant was based occurred one week before its issuance there was nevertheless then-existing probable cause to search the identified residence. The affidavit justified the conclusion that the marijuana which Borja sold to Jiminez on July 8, 1964, and on July 14, 1964, was in each instance first obtained from appellant's residence immediately prior to the sale. The pattern of events over the two preceding weeks would lead a man of reasonable caution to believe that the contraband would be in the house on the third week when the search warrant was issued, July 22, 1964.

III

THE ADMISSION INTO EVIDENCE OF APPELLANT'S STATEMENTS TO THE POLICE WAS NOT ERROR UNDER APPLICABLE FEDERAL LAW.

As was noted in Argument I above, the issue of

whether it was reversible error under applicable federal law for the trial court to have admitted into evidence statements which appellant made to the police has not been presented to the California state courts in a proceeding for post-conviction relief by way of collateral attack on appellant's conviction. For this reason, the issue should not be considered in a petition to a federal court for a writ of habeas corpus. 28 U.S.C. § 2254. By including in this brief the following discussion which disposes of this issue on the merits appellee does not concede that the issue is properly before this Court.

. The record on appeal to this Court makes it abundantly clear that the admission into evidence of appellant's statements to the police was not error under applicable federal law.

The California Court of Appeal determined that the admission into evidence of appellant's statements violated the rule announced in Escobedo v. Illinois, 378 U.S. 478 (1964), but was nevertheless not reversible error under Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).* This determination of the California Court of Appeal was

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* The opinion of the California Court of Appeal is attached hereto and is "EXHIBIT B." The portion of the court's holding referred to above appears at page 9 of this opinion.

made without benefit of the opinion of the United States Supreme Court in Johnson v. New Jersey, 384 U.S. 719 (1966). In that case, the Supreme Court made a clear statement of its holding in the Escobedo case:

> "Apart from its broad implication, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial, '[where the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent . . . .'" 384 U.S. at 733-34.

This statement of the holding in Escobedo is in the conjunctive so that absent any one of its several elements the admissibility of an accused's statements to the

police must be determined according to the long established rules regarding voluntariness rather than according to the holding of that case. See Johnson v. New Jersey, supra, at 732-33.

The automatic exclusionary rule announced in Escobedo is inapplicable to the statements which appellant made to the police because there is no evidence that appellant had requested an opportunity to consult with his attorney prior to having made these statements, nor is there any such allegation in the petition to the District Court. The District Court correctly determined that appellant's failure to have requested counsel prior to making his statements precludes application of the Escobedo rule. Johnson v. New Jersey, supra; VonSchmidt v. United States, 366 F.2d 773 (9th Cir. 1966). Appellant's trial having occurred prior to June 13, 1966, he cannot avail himself of the more encompassing doctrine of Miranda v. Arizona, 384 U.S. 436 (1966). Johnson v. New Jersey, supra.

For the above reasons, there is no allegation in the petition to the District Court which would justify a determination that the trial court erred as a matter of federal law by having admitted into evidence appellant's statements.

IV

WHETHER APPELLANT'S CONVICTION OF VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 11531 WAS IN PART BASED ON HEARSAY EVIDENCE RAISES NO FEDERAL QUESTION.

In his last argument appellant contends that there was such an insufficiency of evidence in support of the charge of sale of marijuana that his conviction thereof amounts to a violation of due process of law. Appellant contends that the only evidence supporting this charge was the testimony of the informer Ricco Jiminez that Frank Borja told him he obtained the marijuana he sold to Jiminez from appellant and that such evidence is inadmissible hearsay.

Appellant's contention is utterly devoid of merit because on the one hand, it fails to raise any federal issue and on the other hand, is wrong as a matter of fact. Even if appellant's conviction for sale of marijuana were based on hearsay evidence inadmissible under the state rules of evidence, it would not thereby impair any right which appellant is entitled to under the United States Constitution. In any event, appellant's argument lacks merit because there was other evidence supporting his conviction for sale of marijuana. The evidence, independent of any statement made by Frank Borja, which supports this conviction is discussed by the California

Court of Appeal on page 9 of its opinion (Exhibit B, p. 9), and appears at pages 4-6 of the reporter's transcript of proceedings before the grand jury.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the petition for writ of habeas corpus should be affirmed.

DATED: June 2, 1967

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General

Attorneys for Appellee

EO
CR SF
66-1202

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

June 2, 1967

Karl S. Mayer

KARL S. MAYER
Deputy Attorney General
of the State of California

E X H I B I T "A"

[illegible]

IN THE

SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE APPLICATION OF JAMES S. PACHECO FOR A WRIT OF HABEAS CORPUS.

Filed 8-12-66

PETITION FOR WRIT OF HABEAS CORPUS

66-1202

Petitioner, JAMES S. PACHECO, by and through his attorney, EDWARD L. CRAGEN, respectfully petitions this Court for a Writ of Habeas Corpus and respectfully shows:

I

Petitioner filed a timely Notice of Appeal in the Superior Court of the State of California in and for the City and County of San Francisco in the matter of "PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff vs. JAMES S. PACHECO, et al., Defendants," being Action No. 64039 in said Court. Thereafter he perfected his appeal in the District Court of Appeal of the State of California First Appellate District, Division Three, in Action No. 1 Crim. 5038; that on or about March 17, 1966, the judgment of conviction as to petitioner was affirmed and Opinion certified for non-publication, a copy of which said Opinion is attached hereto as Exhibit "A", and included herein by reference as if fully set forth at length. On April 4, 1966, petitioner filed in the said District Court of Appeal a Petition for Rehearing. On April 15, 1966,

Rehearing was denied. No Petition for Hearing was filed in this Court. On May 17, 1966, remittitur was forwarded to the County Clerk of the City and County of San Francisco and Ex officio Clerk of the Superior Court of the City and County of San Francisco to be spread on the Minutes. Time of Petition for Hearing in this Court has passed.

II

Reference is hereby made to the complete file in the aforesaid action No. 1 Crim. 5038, and by said reference the matters contained therein are incorporated herein as if set forth at length.

III

In the action below a search warrant which produced the only evidence against petitioner was issued on the strength of a hearsay affidavit. The affidavit appears in its entirety in the file of the District Court and was included because the petitioner at all times challenged the hearsay as being insufficient as a matter of law. A copy of said affidavit is lodged concurrently herewith.

IV

The reason for this petition is based on the grounds that there are no standards for the sufficiency of search warrants in this state as of this date. The decisions which this Court has made concerning search warrants have all been replaced by two recent United States Supreme Court cases

which said cases set forth stricter standards for the supervision of the issuance of search warrants. See Jones vs. United States, 362 U.S. 257, and Aguilar vs. Texas, 378 U.S. 108, (the stricter federal standards are contrary to the California holdings in People vs. Acosta, 142 CA 2d 59, and Arata vs. Superior Court, 153 CA 2d 767, wherein California has held that hearsay testimony is of and in itself sufficient to justify issuance of a search warrant). Admission of evidence secured through use of a search warrant issued on a basis of insufficient corroborating hearsay testimony contravenes the Fourth and Fourteenth Amendments to the United States Constitution.

V

Petitioner is informed and believes and upon information and belief alleges that there are conflicting opinions by the various District Courts of Appeal in the State of California regarding the application of federal standards to state search warrants. Upon information and belief he further alleges that these opinions have been certified for nonpublication under California rules of court, Rule 976. Because of the said conflict of opinions and certification for nonpublication, he was and is unable to present to this Court California case authority to support his position. Rule 976 has provided for an Appellate Star Chamber whereby the certification for nonpublication of opinions (other than petitioners) deprive him of citing California authorities to

substantiate his claims, resulting in the deprivation of his liberty without due process of law and contrary to the Fifth and Fourteenth Amendments to the Constitution. Rule 976 Sub Sec. (c) also is repugnant to Article 6, Sec. 16 of the California Constitution which provides:

> "The Legislature shall provide for the speedy publication of such opinions of the Supreme Court and of the district courts of appeal as the Supreme Court may deem expedient, and all opinions shall be free for publication by any person." (Emphasis added.)

Article 6, Sec. 16 places the discretion, if any, as to whether an opinion shall be published in the Supreme Court and no other court. Rule 976 (c) attempts to delegate this authority to the District Courts of Appeal. By rules of statutory construction, this authority cannot be delegated.

Thus, petitioner has been denied due process of law in the trial and the appeal of this matter. (See also Article I, Sec. 13).

VI

Petitioner has no adequate remedy at law.

VII

No prior applications for Writ of Habeas Corpus have been made and this petition is filed in this Court because the courts below have implicitly ruled against this application in findings in the trial court and decision in the District Court of Appeal.

WHEREFORE, petitioner requests that a Writ of Habeas Corpus be issued out of and under the seal of the Court, directed to MATTHEW CARBERRY, Sheriff, ordering him to release the petitioner from custody forthwith, or, in the alternative, that an Order to Show Cause issue to direct the said MATTHEW CARBERRY to show cause before this Court at a time and place set by this Court why said Writ should not issue.

Edward L. Cragen

EDWARD L. CRAGEN
Attorney for Petitioner

JAMES S. PACHECO, being duly sworn, deposes and says: He is the petitioner in the within petition for Writ of Habeas Corpus; that he has read the contents of the said petition and the same is true of his own knowledge except as to matters set forth therein upon information and belief and as to those matters he believes them to be true.

The foregoing is true and correct under penalty of perjury.

Dated at San Francisco, California, this 11th day of August, 1966.

James S. Pacheco

Petitioner

E X H I B I T "B"

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. FRANK FELIX BORJA and JAMES SELOSTIANO PACHECO, Defendants and Appellants.	1 Crim. No. 5038

Appellants Frank Borja and James Pacheco were each charged with two counts of sale of marijuana (Health & Saf. Code §11531). The first sale allegedly took place on July 8, 1964, and the second on July 14th. In a third count, appellant Pacheco was charged with possession of marijuana for sale (Health & Saf. Code §11530.5). Count I of the indictment, charging both Borja and Pacheco with sale, was dismissed as to Pacheco. Borja was found guilty on both counts of sale. Pacheco was found guilty on one count of sale (July 14th), and guilty also on the count of possession for purposes of sale.

The circumstances leading up to the charges against appellants were these: In July 1964 one Agapito Jiminez was working as an undercover man with the San Francisco police. On July 8th Jiminez and two police officers drove to the vicinity of Borja's home. Jiminez left the car and later purchased marijuana from Borja and then returned with it to the police vehicle. On July

14th, Jiminez again contacted Borja for the purpose of buying marijuana. Borja left the presence of Jiminez but Jiminez followed and saw Borja enter the home of Pacheco, where he remained for about 15 minutes. When Borja returned he had a quantity of marijuana concealed beneath his sweater. Jiminez noticed the bulge in Borja's sweater which had not been present when Borja left to go to Pacheco's house. Two San Francisco police officers observed Borja while in the company of Jiminez, and saw him go to and come from the home of Pacheco. Jiminez bought the marijuana Borja brought to him on July 14th.

Contentions of appellant Borja

Count I charged Borja with sale of marijuana on July 8th. He contends that the trial court committed error when it first dismissed this count as to him, and later reinstated it and found him guilty of the offense therein charged.

It appears that both appellants moved to set aside the indictment, and that Pacheco also moved to suppress the search warrant issued for the search of his home. The motion to set aside the indictment was made on September 10th. While the record is not entirely clear, it appears that the court called for briefs, later submitted the matter, and finally ruled upon the motion on November 27th. In ruling on the matter the court stated: "THE COURT: I will grant the motion on Count 1, was it? MR. SHAW: Yes, Your Honor. THE COURT: And deny the motion on Count - - - was it 2 or 3? THE CLERK: There was Count 3 as to Pacheco only. THE COURT: All right. . . ."

On January 12, 1965 counsel for appellants moved to the court that he was prepared to submit the case on the transcript of testimony before the grand jury. Counsel indicated his belief that there were two counts then pending against each of the appellants. The transcript was presented to the court, each side reserving the right to produce additional evidence, and the matter was then continued for further proceedings.

On February 4th appellants were again before the court. The court announced: "I understand that the record shows that I dismissed Count I against both. Of course, the intention was only to dismiss it as to Pacheco. . . Let the record show that I dismissed on Pacheco only."

Appellants' counsel took no exception to these remarks of the court. No further evidence was offered by either side, and after some further discussion between court and counsel the court announced its decision, finding both appellants guilty ". . . on the remaining counts."

We find no merit in Borja's contention that the court was without power to set aside its order of November 27th dismissing count I. In count I both Borja and Pacheco were charged with sale of marijuana on July 8th. It is true that the court purported to dismiss count I, without specifically stating that the dismissal affected only Pacheco and not Borja. Later, however, the court clearly indicated that its intention in ruling on the motion was to dismiss the first count as to Pacheco only. Dismissal of count I as to Borja was thus inadvertent, and made under the mistaken belief

that it related to Pacheco only. Under [illegible] court had power to set aside its previous [illegible] and to enter a new order speaking the truth and reflecting the court's intention at the time the first order was made. (Bartsch v. Bartsch, 19 Cal.2d 209, 214; 3 Witkin, Cal. Procedure, pp. [illegible], 1960, and cases cited.

Borja next contends that his statements made to the undercover agent on the occasion of the sale on July [illegible] were received in evidence in violation of his right to counsel as declared in such cases as Escobedo v. Illinois, 378 U.S. 478, and People v. Dorado, 62 Cal.2d 338. This contention cannot be supported. This same argument was advanced in People v. Sogoian, 232 Cal.App.2d 430, 434, where the court concluded that operations of an undercover officer in dealing with a willing supplier of narcotics did not come within the rule of the Escobedo or Dorado cases. Here, of course, at the time Borja made the sale of July 14th to Jiminez, Borja had not been taken into custody, nor did Jiminez conduct any interrogation designed to get Borja to confess or make any incriminating admissions of criminal activity. It is clear that the essential requirements for the application of rules stated in both Escobedo and Dorado are absent from our facts.

Borja's final argument is that his defense of entrapment bars prosecution for the offenses charged. He contends that the crimes of which he was accused originated in the minds of the police officers, and that he was lured into their commission. (See People v. Benford, 53 Cal.2d 1, 7, 13.) This defense is not sup-

ported by the record. Entrapment is an affirmative defense and one asserting it has the burden of showing that he was induced to commit the offense for which he is charged. (People v. Braddock, 41 Cal.2d 794, 803.) Here, a fair reading of the testimony of the undercover agent discloses only that the latter contacted Borja on both July 8th and 14th, and provided Borja with an opportunity to make the illegal sales. The testimony further reveals discussion between Borja and Jiminez concerning Borja's plan to leave town and possibly turn over his business to his buyer, who he thought was a dealer in narcotics. Plainly enough, these facts show not a trap for an unwary and innocent citizen, but, as was said in Sherman v. United States, 356 U.S. 369, 372, they disclose a ". . . trap for the unwary criminal." (See also People v. Harris, 210 Cal.App.2d 613, 616.) Where, as here, all that is shown is the ordinary circumstance of a sale of marijuana between a willing buyer and a willing seller, the defense of entrapment is not established, even though the buyer is an undercover agent working with the police.

Contentions of appellant Pacheco

Appellant Pacheco first contends that the search of his residence was illegal because the search warrant issued by a magistrate was based upon an insufficient affidavit.

The affidavit to support issuance of the search warrant was made by officer Schneider. He stated that on July 8th and July 14th, 1964 he observed Borja enter the premises at 1237 Carolina Street (Pacheco's home), leave the premises shortly thereafter,

walk a short distance up the street and se[illegible] marijuana to Rico Jiminez, a reliable info[illegible] further stated in the affidavit that ". . . [illegible] affiant that Frank Borja stated to Jiminez that he obtained the marijuana on each of these sales to Jiminez from [illegible] Pacheco, the occupant of 1237 Carolina Street." Other allegations in the affidavit established that Jiminez was a reliable informant who in the past had submitted information to the police resulting in the arrest and conviction of narcotics offenders

We conclude that the affidavit presented to the magistrate was sufficient to justify the issuance of a search warrant. The purpose of the affidavit is to enable the magistrate to determine whether "probable cause" required by the Fourth Amendment to the United States Constitution is present and hence that a search warrant may properly issue. (Giordenello v. United States, 357 U.S. 480, 486.) Such an affidavit is not insufficient merely because it contains some hearsay statements of an informant, providing that other circumstances and facts are disclosed by the affidavit from which the magistrate can reasonably conclude that probable cause for the issuance of a search warrant is established. (See Jones v. United States, 362 U.S. 257; Rugendorf v. United States, 376 U.S. 528.) Here officer Schneider's affidavit disclosed circumstances and facts revealing his own observation of the sale of marijuana from Borja to Jiminez on July 8th and 14th, and established the fact that immediately before these sales

Borja had visited the home of Pacheco [illegible] to the hearsay statements of Jiminez in [illegible] together they justify the magistrate's finding [illegible] cause and support the issuance of the warrant.

Appellant's reliance upon Aguilar [illegible] is misplaced. In that case the affidavit upon which the warrant issued was pure hearsay. No facts were stated other than the bare assertion that affiants had received "reliable information from a credible person. . . ." that narcotics were kept at the described premises.

Appellant Pacheco also contends that his incriminating statements were received in evidence in violation of his constitutional right to counsel, citing Escobedo and Dorado. Pursuant to the search warrant, the officers entered Pacheco's home and there questioned him about narcotics. Appellant went into his bedroom and produced a large paper bag containing many smaller bags of marijuana. Appellant made two statements, the first to the general effect that "32 lids would. . . come to approximately a kilo", and the second that he ". . . had been pushing $12,000 a year in the sale of marijuana, not counting the sale of dangerous drugs", and that he had been engaged in this activity for approximately seven years. There is no showing that, at the time appellant made these statements to the officers he had been told of his right to counsel and his right to remain silent. It is also clear that suspicion had focused upon him, that he was in custody, and it is a reasonable inference that the purpose of the questioning by the officer was

to secure a confession, or at least admissions concerning his possession of marijuana for sale. Hence, admission of appellant's statements into evidence did violate the rule of the Escobedo case, and is contrary to principles set forth in People v. Dorado, supra. We conclude, however, that the error does not compel reversal of the judgment. Appellant was charged with possession of marijuana for purpose of sale. (Health & Saf. Code §11530.5.) As will be seen from an examination of appellant's statements, they do not amount to a confession of the charged offense. The error, therefore, is not one that rises to the dignity of reversible error per se, but is subject to the test of prejudice. (See People v. Hillery, 62 Cal.2d 692, 712; People v. Luker, 63 A.C. 485.) We look to the record to determine if the introduction into evidence of appellant's statements caused prejudice. We do not believe such prejudice occurred here. Apart from appellant's statements there is a great deal of other evidence pointing to his guilt of the charged offense. Borja, a known seller of marijuana, was twice observed entering appellant Pacheco's house. On each occasion he remained there for a short time and then returned to the street to make a sale of marijuana. Jiminez testified in effect that on the occasion of the second sale he saw no bulge in Borja's sweater when he first met him but when Borja returned from Pacheco's house, there was a bulge in his sweater. Jiminez thereafter observed Borja remove several packets of marijuana from underneath his sweater; he then sold these packets to Jiminez. Further, appellant produced a large bag from his bedroom. It con-

tained many smaller bags of narcotics [illegible] officers. This evidence is persuasive of [illegible] apart from his statements to the officers [illegible] statements, it is difficult to see how any [illegible] one of guilt of the charges of sale and [illegible] have resulted from the evidence before the court [illegible] Connecticut, 375 U.S. 85, 86-87; Cal. Constitution [illegible] § 4 1/2; People v. Watson, 46 Cal 2d 818, 836.)

Appellant's final contention is that there is no proper evidence in the record to support his conviction on the charge of sale of marijuana (Health & Saf. Code §11531) or on the charge of possession of marijuana for sale (Health & Saf. Code §11530.5). But there is sufficient evidence to support appellant's conviction on both counts. Although the case was submitted to the court on the basis of the transcript of proceedings before the grand jury, and no additional evidence was received, we must apply the usual rules of appellate review. Thus we may not set the judgment aside if there is any sufficient substantial evidence to uphold it. (People v. Newland, 15 Cal.2d 678, 681.) Appellant's conviction on the count of sale is supported by the testimony of Jiminez, which shows that before Borja left to go to appellant's house, Jiminez looked for bulges under Borja's clothing, having in mind the possibility of a concealed weapon, and saw nothing unusual; that when Borja returned from appellant's house, however, there was a bulge beneath Borja's sweater, caused by the quantity of marijuana he carried, and thereafter sold to Jiminez.

Appellant's conviction on the count of possession of marijuana for sale is fully sustained by the evidence which shows his possession of a large quantity of marijuana, packaged in many separate, smaller packages. The court could reasonably infer from this fact that possession of a large quantity of narcotics, packaged in many smaller packets, was for the purpose of making its sale more convenient and rapid when the opportunity for sale presented itself. (See People v. Robbins, 225 Cal.App.2d 177, 180, 184; People v. Coblentz, 229 Cal.App.2d 296, 302.)

The judgment as to each defendant is affirmed.

Salsman, J.

We concur:

Draper, P.J.

Devine, J.

Certification of Nonpublication

This opinion does not require publication in the advance sheets of official reports, under the standards provided by rule 976 of the California Rules of Court.

Draper, P.J.

Salsman, J.

Devine, J.

United States
COURT OF APPEALS
for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant,

v.

DONALD L. BREWER, administrator of the estate of William Ira Pate, deceased,

Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE BRUCE R. THOMPSON, Judge

WILLIAMS, SKOPIL & MILLER
OTTO R. SKOPIL, JR.
9th Floor, Capitol Tower,
Salem, Oregon 97301,
Attorneys for Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 5-67

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APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE BRUCE R. THOMPSON, Judge

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court to hear this cause is based upon an amount in controversy in excess of $10,000.00, exclusive of interest and costs, between citizens of different states. (Act of July 25, 1958, 72 Stat. 415, Amending 28 U.S.C.A. § 1331 and 1332) (R. 1). The jurisdiction of this Court to review the District Court's decision is based

upon § 1291 of Title 28, United States Code, this appeal having been taken from a final judgment entered on November 7, 1966 (R. 153).

STATEMENT OF THE CASE

Appellee commenced this action in the District Court for the District of Oregon, seeking a judgment against appellant in the amount of $31,979.38 plus interest (R. 6). Appellee alleged that he had been appointed administrator of the estate of William Ira Pate, deceased, who had been insured by appellant for liability for bodily injury and property damage caused by accident arising out of the ownership, maintenance, or use of a motor vehicle. Appellee had been involved in a collision with a motor vehicle operated by the deceased Pate and, as a result of this action, recovered a judgment against Pate in the Circuit Court of the State of Oregon for the County of Multnomah in the amount of $42,141.25.

Appellee alleged that appellant acted in bad faith and violation of its fiduciary duty to the deceased in that it failed to accept appellee's offer to accept $10,000.00 in full settlement of the claim prior to the entry of the judgment in Multnomah County and further, to accept appellee's offer to accept $10,000 in full settlement of the judgment after the entry of the judgment.

After the verdict in the Circuit Court for the State of Oregon, appellant filed a motion to set aside

the verdict and grant a new trial on the basis of newly-discovered evidence (R. 4). This motion was denied by the State Court on May 5, 1964 (R. 4).

On November 7, 1966, the Court below entered its findings of fact and conclusions of law (R. 122-126), in which it found that the appellant had acted in good faith and with due and proper regard of the interests of its insured prior to the verdict in the State Court action. The Court further found that the appellant was careless and negligent and acted in disregard of the interests of its insured in failing to accept appellee's offer to settle within the limit of its policy after the verdict and prior to the Court's ruling on the motion for new trial.

Based upon the findings, the Court below found that the estate of appellant's insured had been damaged by the tortious conduct of appellant in the amount of $31,979.38 and entered judgment (R. 127).

SPECIFICATIONS OF ERRORS

I. The good faith determination by an insurer that its insured will not necessarily be found liable for damages suffered by a claimant is not changed by a jury determination that the insured was negligent.

II. The extent of the damage to the estate of the appellant's insured was only $461.18.

III. Interest, bias, and inconsistency must be considered in evaluating the testimony of a witness.

IV. Attorney's fees are not to be awarded in actions based upon negligence of an insurer in failure to settle a claim against its insured.

SUMMARY OF ARGUMENT

State Farm, the insurer, had, in the State Court action, in good faith, determined that its insured would not necessarily be found liable for the damages suffered by Breuer and consequently refused to settle with the claimant. After trial and a resulting jury verdict and during the pendency of a motion for a new trial, it is asserted that additional offers to settle were made. Appellant, State Farm, should not be required to abandon its position because of a jury determination. To do so would effectively deprive a company of its right of appeal.

The object of compensatory damages is to make the person injured whole. The damages which are the subject of this action are the damages to State Farm's insured, *not* the damages to the claimant, Breuer. Since it is established that the insured's estate was limited to $461.18, that should be the total amount of damages involved.

The sole source of the testimony concerning the communication of offers of settlement subsequent to the jury's verdict in the state court is the testimony of the attorneys involved; and this testimony is diametrically opposed. It is necessary to examine the credibility of the witnesses involved. On the basis of interest, bias, and inconsistency, the testimony of the

attorney for the claimant is of less weight and force than the testimony of the defendant's counsel.

ARGUMENT I.

A. The appellant as an insurer, having, in good faith without negligence, determined that its insured would not necessarily be found liable for the damages suffered by the claimant should not be required to abandon that position in the face of a jury verdict in excess of the limit the defendant has contracted to pay in the event of its insured's liability.

An insurance company which has defended and negotiated in good faith on behalf of its insured should not be required, after the rendition of a verdict in excess of its policy limits, to accept such an offer. The duty, under its contract, of the insurer is to protect its financial interest and that of its insured. To require the insurer to accept any offer within the limits of the contract after a trial verdict in excess of those limits would have the effect of denying the company its right to an appeal. *Chancey* v. *New Amsterdam Cas. Co.*, 336 S.W.2d 763. If an insurance company has been determined to have honestly defended its insured interests up to the point of verdict, in the face of such a rule it could retire its obligation by paying that portion of the verdict it was contractually obligated to pay, even though it properly felt there was manifest error in the trial of the case. To impose such a rule would result in a disservice both to the responsibility of the company and its insured. The duty to properly defend should not end at the trial

court level. The effect of such a rule would deprive the insured of the very benefit for which he has paid.

The problem of excess liability has become increasingly important to the automobile insurance companies. This can be attributed to high verdicts and a generally more liberal attitude of the courts in permitting excess recoveries from the insurance companies. Consequently the question of good faith on the part of the insurer becomes of paramount importance. Although many recent cases have been decided on the question of good faith, it is a relatively new area in Oregon. The Oregon Supreme Court has rendered only three decisions on the issue under consideration. Due to the absence of litigation, there is yet to be established in this state a definite standard as to what constitutes good faith or, in the negative, bad faith. This deficiency was recognized by Justice Rossman in his opinion in the case of *Radcliffe* v. *Franklin Nat'l Ins. Co.*, 298 P.2d 1002, where he succinctly stated:

> "Universal recognition that the insurer owes a duty in regard to the settlement of claims and actions has not yielded a rule which clearly defines the duty."

The *Radcliffe* case is the only case which serves to enlighten this jurisdiction on the issue of what constitutes good faith conduct by an insurer in an excess liability case. The *Radcliffe* decision was given additional support by the Oregon Supreme Court in the recent decision of *Kuzmanich* v. *United Fire & Casualty Co.*, 410 P.2d 812.

The *Radcliffe* case, like the instant case, was an action against an automobile liability insurer to recover the amount of a judgment entered against the insured in excess of the policy's coverage. In *Radcliffe*, however, judgment was entered for the defendant on a directed verdict. The court found that if the insurer had exercised due care in its investigation, evidence regarding liability and injuries would have been available which might have led to the acceptance of settlement offers within the policy limits.

In defining the duty of the insurer, the opinion concludes:

> "Negative elements do not meet the demands of good faith. A decision by one who is ignorant of the controlling facts is worthless. Only a decision made by one who exercised due diligence in apprising himself of the material facts is entitled to respect as made in good faith."

Although establishing a stringent standard of liability for insurers in cases involving failure to settle within policy limits, the *Radcliffe* opinion clearly recognizes that the insurer is not obligated to sacrifice its own interest. The quality of consideration to the respective interests of the parties, not sacrifice of the insurer's interest to that of the insured, is the required standard.

> "Plainly, an automobile owner who produces a policy of limited liability insurance understands that the company is in business and that unless it looks after its own interests it cannot expect to survive. The insurer, obviously, has a right to

give heed to its own interests when it considers settlement offers, but when it does so it must give at least as much attention to those of the insured."

In the context of the *Radcliffe* case, there can be no doubt of the substantiality of the evidence to support the trial court's findings. The lack of due care found in the *Radlcliffe* case in investigating the claim and in apprising the insured of settlement offers is totally lacking in the present case. In further contrast to the *Radcliffe* case, the evidence here discloses a thorough and complete investigation of all facits of the claim underlying the former action. All prospective witnesses who might have contributed information concerning the case were contacted and interviewed, every possible source of relevant information was investigated, and that information obtained was carefully evaluated. The entire record and file of the insurer points to the conclusion that the rejection of settlement offers was based on a well-documented, conscientiously-evaluated mass of facts which provided ample basis for the conclusion that the insurer was not liable upon the claim.

In applying the standards estabilshed by the *Radcliffe* case to the case under consideration, in view of the substantial evidence of appellant's records before the Court, it can be concluded that the appellant insurer has exhibited conduct which has been marked by due care and good faith through the course of this case.

In the *Kuzmanich* case, the Oregon Supreme Court

applied the standard as established by the *Radcliffe* case, where in the opinion the Court held:

> "An insurer owes to its insured the duty of due diligence and good faith. In determining whether to settle claims against the insured, the insurer must act as if it were liable for the entire judgment that might eventually be entered against the insured. In addition, only a decision made by an insurer who exercises due diligence in apprising itself of the material facts is entitled to be considered as made in god faith." *Radcliffe* v. *Franklin Nat'l Ins. Co.*, 298 P.2d 1002.

With this standard established, the Court concluded that there was no element of bad faith on the part of the insurer.

> "It is the court's opinion there was sufficient substantial evidence to sustain the findings of the trial court to the effect that defendant was not negligent and did not exercise bad faith. The investigations made by defendant prior to trial appear to have been adequate and complete." *Kuzmanich* v. *United Fire & Casualty Co.*, supra.

Since the trial court found in applying Oregon law stated above that the appellant had used reasonable care, skill, and diligence prior to the determination of the jury (R. 123), it cannot be said that it failed to do so in refusing to accept an offer within the policy limits thereafter.

B. The appellant's motion for a new trial in the personal injury action filed in the state court proceeding was not perfunctory in nature but was well founded.

The statutes of the State of Oregon provide the grounds upon which a judgment may be set aside and a new trial granted. Such statute provides:

> "17.610. Causes for granting new trial. A former judgment may be set aside and a new trial granted on the motion of the party aggrieved for any of the following causes materially affecting the substantial rights of such party:
>
> "(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.
>
> "(2) Misconduct of the jury or prevailing party.
>
> "(3) Accident or surprise which ordinary prudence could not have guarded against.
>
> "(4) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.
>
> "(5) Excessive damages, appearing to have been given under the influence of passion or prejudice.
>
> "(6) Insufficienty of the evidence to justify the verdict or other decision, or that it is against law.
>
> "(7) Error in law occurring at the trial, and excepted to by the party making the application."

One of the grounds upon which the motion for new

trial was based was the use of a false name by the plaintiff in the state court proceedings. The plaintiff in the state court proceedings used the name "Lee D. Breuer" when in fact his true name was "Donald L. Brewer." The use of a false name was obviously a fraud upon the Court and the public. This is further evidenced by Donald L. Brewer having applied with the State of Oregon for a driver's license under the name of Lee D. Breuer when in fact his driver's license under his true name had been suspended for driving violations (Tr. 7-8).

The failure of the plaintiff in the state court proceedings to reveal his true name deprived the appellant's insured of substantial rights in investigation, cross examination, and the right to have the jury consider the use of a false name in determining the credibility to be given to Breuer's testimony.

Such rights were of great importance to appellant's insured in the state court proceedings, as the liability question was doubtful and the jury was required to adopt either the testimony of the plaintiff or that of the defendant.

Based upon the grounds appellant's insured had for his new trial, the appellant herein certainly had the right, without being guilty of bad faith or negligence, to have the motion determined before being compelled to pay its policy limits.

ARGUMENT II

An insured who has had a judgment in excess of policy limits rendered against him has not been injured until such time as he has paid or is shown to have assets subject to the judgment which exceeds the limits of his insurer's contractual obligation.

The crucial question is whether the insured has been harmed. *Harris* v. *Standard Accident and Ins. Co.*, 297 F.2d 627. Damages, either in tort or contract, accrue when the plaintiff has been injured; and the claimant's right in an action against the insurer can rise no higher than the rights of the insured. *Suguros Tepeyac, S.A., Companie Mexicana de Seguros Generales* v. *Bostrom*, 347 F.2d 168. Regardless of whether the duty of the insurer lies in tort or contract, the duty is to respond in damages. It must be borne in mind that these are *not* the damages that have been inflicted *by the insured* but the damages that may have been inflicted *upon the insured.*

> "The purpose of tort damages is to compensate an injured person for the loss suffered and only for that." *Harris* v. *Standard Accident & Ins. Co.*, supra at 627.

Equally in contract:

> "The cardinal purpose of the law of damages is to place the wronged party in as good a position as he would have been in had the other performed his contract." *Stubblefield* v. *Montgomery Ward & Co.*, 96 P.2d 774.

The basis of an action for wrongful failure to set-

tle is the damage to the insured, not the damage to the person the insured may have injured. It is argued that the insured suffers from the excess judgment lodged against him. To say that an insured is damaged thereby alone without his paying or having assets subject to execution on the judgment is to ignore what in fact happens. The impact of the judgment will never reach him or his estate. Had he lived, bankruptcy would have discharged him; and the assets of the decedent's estate are beyond the reach of this judgment creditor. This applies to judgment creditors as well as general and secured creditors. Ultimately the only person who would be compensated by a judgment against the defendant in this action is the person the insured insisted was not entitled to compensation.

Except for the sum of $461.18, the estate of William Pate is wholly insolvent. It is incumbent upon the appellee to show that the estate of William Pate will suffer pecuniary damage by reason of the excess judgment. The excess judgment stands on the same footing as any other non-preferential claim against the estate and under the provisions of Oregon Revised Statute 117.110 can be satisfied only after satisfaction of the preferential items. ORS 117.110 states:

> "Order of payment of charges and claims. The charges and claims against the estate which have been presented and subsequently established by judgment or decree within the first six months after the date of the notice of appointment of the executor of administrator, shall be paid in the fol-

lowing order, and those presented and allowed or established in like manner within each succeeding period of six months thereafter, during the continuance of the administration, in the same manner:

"(1) Funeral charges and expenses of last sickness.

"(2) Taxes of whatever nature due the United States.

"(3) Taxes of whatever nature due the state, or any county or other public corporation therein.

"(4) Debts preferred by the laws of the United States.

"(5) Debts which, at the death of the deceased, were a lien upon his property, or any right or interest therein, according to the priority of their several liens.

"(6) Debts due employes of decedent for wages earned within the last 90 days immediately preceding the death of the decedent.

"(7) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

"(8) All other claims against the estate."

Until the appellee has sustained the burden of showing that after satisfying the claims of preferential creditors as is required by ORS 117.110, there remains funds in the estate by which the estate can suffer pecuniary damage, there can be no damage to

the estate. The contract of insurance is a contract of *indemnity*, and the obligation of the insurer is to make the insured whole. *Hardwick* v. *State Ins. Co.*, 26 Pac. 840.

ARGUMENT III

The Court, when sitting as a trier of fact, must consider the credibility of a witness and must evaluate interest, bias, and inconsistency.

Reluctantly, but necessarily, attention must be drawn to the testimony of Mr. Ryan, the attorney for the plaintiff in the trial court proceeding. Although the appellant is convinced that the arguments presented above should establish that it has acted within the standard of care required of it and has not breached its contract with the insured and neither the insured nor his estate has been damaged by the appellant's conduct, appellant is still required to call to the Court's attention those matters which affect the credibility of Mr. Ryan's testimony.

A. The credibility of a witness in each case must be determined by the trier of fact.

Herein the Court, as a trier of fact, is faced with the difficult and delicate problem of determining which of the two testifying attorneys more accurately recalls the events surrounding the settlement negotiations prior and subsequent to the verdict in the state court. Unpleasant as this task may be, unless the Court rules for the appellant on one of the two preceding arguments, this determination must be made.

B. Inconsistency of testimony.

(1) In the course of the deposition of Mr. Ryan, it was indicated that the offer to settle within the limits was made by way of a telephone conversation. (Pl. Ex. 28, p. 9). In the course of Mr. Ryan's testimony at trial, he indicated that offers of settlement were made in person during an automobile ride.

(2) Plaintiff's Exhibit 20 obviously indicates that counsel for Breuer (Brewer) are aware of the possibility that the defendant insurer might be held liable for failure to settle within the limits of the policy and consequently arranged that offers and demands were made in writing, yet during the period subsequent to the jury verdict they appear to have neglected the establishment of a record of offers despite their contention that defendant might be under a greater duty to accept such an offer.

(3) The testimony of Mr. Samuels, the attorney for the defendant insurer, and the exhibits presented show a consistent pattern of written communication of all offers to his client, the insurer, yet no record, despite extensive discovery procedure, has been produced showing any such communication subsequent to the verdict of the jury.

C. Interest of the witness.

The fact that a witness is the attorney for one of the parties goes to his credibility even though he does not appear in the case as an attorney after he testifies. *In re Comegys Estate,* 284 P.2d 512.

An attorney's credibility is especially affected where his employment is on a contingent fee. *Harrington* v. *Hamberg*, 85 Iowa 272; *Firth* v. *Briarton*, 212 N.W. 805.

It is necessary to call to the Court's attention that the firm of which Mr. Ryan is a member continues to press this action. There is no intention of implying that Mr. Ryan is testifying to facts contrary to his recollection, the rule of interest as affecting credibility is based upon the practical fact that memory is inclined, when in doubt, to follow interest; and it is respectfully urged that this should be borne in mind in evaluating the testimony of the witnesses before the Court.

ARGUMENT IV

Atorneys fees are improperly awarded in an action based upon the negligence of an insurer as they are limited to actions on the contract of insurance between the contracting parties thereto.

The appellee's theory of recovery is based on either the negligence of the appellant or that the appellant, in bad faith, rejected the offer of appellee to settle the claim of appellee for the policy limits and in refusing to pay its policy limits (R. 1-6).

The statutes of the State of Oregon provide for recovery of attorney fees against an insurance company only if suit or action is brought upon the policy of insurance. The statute provides:

"736.325. Recovery of attorney fees in action

on policy. (1) If settlement is not made within six months from the date proof of loss is filed with an insurance company, fraternal benefit society or health care service contractor and a suit or action is brought in any court of this state upon any policy of insurance of any kind or nature, including a policy or certificate issued by a fraternal benefit society as defined in ORS 740.010 and a contract or agreement issued by a health care service contractor as defined in ORS 742.010, and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such suit or action, then the plaintiff, in addition to the amount that he may recover, shall be allowed and shall recover as part of his judgment such sum as the court or jury may adjudge to be reasonable as attorney's fees.

"(2) If attorney fees are allowed as provided in this section and on appeal to the Supreme Court by the defendant the judgment is affirmed, the Supreme Court shall allow to the respondent such additional sum as the court shall adjudge reasonable as attorney fees of the respondent on such appeal."

It is apparent from the complaint filed by the appellee that this is not an action upon the policy of insurance issued by the appellant but is an action sounding in tort, either upon bad faith or negligence.

The distinction between an action upon a contract, such as a policy of insurance, and one founded upon a tort by reason of a relationship established by a contract between the parties has been discussed by the

Court in *Harper* v. *Interstate Brewery Co.*, 120 P.2d 757:

> " 'The *Distinction between a Tort and a Breach of Contract* is broad and clear, in theory. In practice, however, it is not always easy to determine whether a particular act or course of conduct subjects the wrongdoer to an action in tort, or merely to one for a breach of contract. The test to be applied is the nature of the right which has been invaded. If this right was created solely by the agreement of the parties, the plaintiff is limited to an action *ex contractu*. If it was created by law he may sue in tort." Burdick on Torts (4th ed.) Page 46."

67 Harvard Law Review, page 1136.

The action of the appellee is based upon a tort. It is not an action to recover a loss under the policy of insurance. Therefore, appellee is not entitled to attorneys fees. *Zumwalt* v. *Utilities Ins. Co.*, 228 S.W.2d 750.

Respectfully submitted,

WILLIAMS, SKOPIL & MILLER
OTTO R. SKOPIL, JR.
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

OTTO R. SKOPIL, JR.
Of Attorneys for Appellant

No. 21670

United States
COURT OF APPEALS
for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,

Appellant and Cross-Appellee,

v.

DONALD L. BREWER, Administrator of the Estate of William Ira Pate, Deceased,

Appellee and Cross-Appellant.

BRIEF FOR APPELLEE AND CROSS-APPELLANT

On Appeal from the United States District Court for the District of Oregon

HONORABLE BRUCE R. THOMPSON, Judge

JAMES J. KENNEDY
RYAN & RYAN
1016 Yeon Building
Portland, Oregon 97204
Attorneys for Appellee and Cross-Appellant

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-67

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TEXTS

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JURISDICTIONAL STATEMENT

Appellee and Cross-Appellant accepts the jurisdictional statement of Appellant and Cross-Appellee.

QUESTIONS PRESENTED

In an effort to avoid cumbersome phraseology, appellant and cross-appellee will hereinafter be referred to simply as appellant or the insurer or the

insurance company and appellee and cross-appellant will hereinafter be referred to simply as appellee or the administrator of the estate of the deceased insured.

For similar reasons, the policy holder will be referred to as the insured or Pate and the injured plaintiff and judgment creditor in the State court personal injury action will be referred to as Brewer.

This Federal court case was divided into two parts:

(1) The negligence and bad faith of the insurer in not settling the personal injury action against its insured within its policy limits of $10,000.00 before the jury therein rendered a verdict for $42,141.25;

(2) The negligence and bad faith of the insurer in not settling the judgment of $42,141.25 within the policy limits of $10,000.00 after verdict and before motions for new trial was denied (R. 72-86).

The Federal trial judge, sitting without a jury, allowed judgment herein to the Administrator of the estate of the deceased insured for the full amount of the excess judgment plus attorney's fees in prosecuting the excess judgment case below.

In arriving at this judgment, the Federal trial judge found that the insurer did not act negligently and in bad faith before the verdict was rendered but did act negligently and in bad faith in not settling the $42,141.25 judgment after verdict and before the motions for new trial were denied in the personal injury case.

He also found that $4,000.00 was a reasonable attorney's fee to be allowed for prosecuting the Federal court excess judgment case below (R. 122-128).

It is the position of appellee (contrary to the position of the appellant) that the Federal trial judge did not err in allowing judgment in the personal injury action plus attorney's fees but did err as follows:

> (1) In not also basing his judgment against the insurer on the further ground that the insurer had acted negligently and in bad faith in failing to settle the personal injury action within the policy limits of $10,000.00 before the jury rendered its verdict for $42,141.25;
>
> (2) In limiting attorney's fees to the sum of $4,000.00 instead of in the larger sum of $12,791.75 as called for by a contingent fee arrangement. This error came about because the Federal trial judge refused to recognize the validity of a contingent fee arangement despite the fact that the Oregon Supreme Court has upheld such an arrangement in a case of similar nature (Tr. 316-318; *Denley* v. *Oregon Auto Ins. Co.*, 151 Or. 42, 57, 58, 47 P.2d 946 (1935).

The gravamen of the cause of action herein is that the insurer violated the contractual terms of its policy under which it had sole control over negotiations and settlement of the personal injury action against its insured in that the insurer acted negligently and in bad faith in failing to settle within the policy lim-

its of $10,000.00 (R. 77; Pl. Exh. 11, insurance policy).

STATEMENT OF THE CASE

The statement of the case by appellant is incomplete. Therefore the statement of the case by the appellee follows:

Donald L. Brewer is the duly appointed, qualified and acting administrator of the insured's estate and in that capacity was the plaintiff in the excess judgment case below.

Donald L. Brewer was also the injured claimant and plaintiff in the State court personal injury action against the insured, Pate, but is not suing here in that capacity.

As the administrator of Pate's estate, Brewer is the proper party plaintiff herein (Points and Authorities (1), (2), (3), (4), *infra.*

The amount sued for herein was in the liquidated sum of $31,979.38, representing the difference between the personal injury verdict of $42,141.25 plus costs of $88.24 and the sum of $10,000.00 plus $250.11 on account of costs and interest which the insurance company paid into the registry of the State court on May 7, 1964 in partial satisfaction of said judgment after its motions for new trial and been denied (R. 75, 76).

The amount sued for herein also included the additional sum of $12,791.75 as attorney's fees for

prosecuting this action. The attorney's fee was based upon a contingent fee arrangement of 40% of the amount sued for or 40% of $31,979.38 in accordance with the Minimum Bar Fee Schedule of the Oregon State Bar (R. 76, 84-Tr. 40, 41, 316-318).

Prior to the commencement of this action the Probate Judge, having jurisdiction over the Pate estate, examined and allowed the claim of Brewer, the injured plaintiff in the State court action, against Pate's estate in the said sum of $31,979.38 (R. 76).

Before and at the time the personal injury complaint was filed and the case tried, Donald L. Brewer was using the name of Lee D. Breuer and his complaint was filed and his case tried under that name. Use of the name, Lee D. Breuer, was not made to defraud creditors or for any improper purpose and the State trial judge so held in later denying the motions for new trial (Pl. Exh. 7, Brewer's Affidavit; Pl. Exh. 10, pp. 187-189, 192; Tr. 7, 8, 11).

With reference to the personal injury action, the allegations of negligence alleged and submitted were that Pate, the insured, failed to keep a proper lookout, proper control or to stop, turn or swerve his vehicle to avoid the collision and that he failed to yield the right of way to Brewer (Pl. Exh. 10, pp. 88-90; Pl. Exh. 1).

In his answer, Pate denied these acts of negligence and alleged that Brewer was contributorily negligent in failing to keep a proper lookout, proper control, and in driving at an excessive speed and

running a red traffic light (Pl. Exh. 10, pp. 91, 92; Pl. Exh. 2).

In his reply, Brewer denied the charges of contributory negligence and demanded judgment for $75,000.00 general damages and $12,141.25 special damages (Pl. Exh. 10, p. 92; Pl. Exh. 3).

Much of the evidence herein to prove that the insurer acted negligently and in bad faith in failing to settle the personal injury case both *before* verdict and *after* verdict cannot be controverted. This is so, because this vital evidence is in the form of written exhibits herein. Or it is contained in the written transcript of all the testimony and proceedings of the State trial judge and exhibits at the trial stage of the personal injury action (Pl. Exhs. 9, 10, 33).

As will hereinafter be shown, the evidence, at the State trial, of Pate's negligence was overwhelming and the evidence of Brewer's contributory negligence was weak or nonexistent.

The seriousness and permanency of Brewer's injuries were uncontested by the insurer at the State trial. The insurer had Brewer examined by its own doctor but did not have this doctor testify at the trial and did not cross examine the doctors called by Brewer (Pl. Exh. 10, pp. 57, 77; Pl. Exhs. 18, 21, p. 5).

Also, the amount of the special damages (medical expenses and wage loss up to the time of trial) in the sum of $12,141.25 was not controverted by the insurer (Pl. Exh. 21; Pl. Exh. 10, p. 82; Pl. Exh. 9,

p. 48). The amount of the special damages alone exceeded the policy limits.

To better understand the facts of the accident, this Court should find it helpful to have before it a large diagram of the scene and which shows distances, skid marks and various locations as given by State court witnesses. This diagram is Plaintiff's Exhibit No. 33 in the Federal court below.

The evidence showed, among other things, that the accident happened at approximately 2:50 a.m. in the early morning of July 23, 1962 in the intersection of S.E. 26th Avenue and Powell Boulevard in Portland, Oregon (Pl. Exh. 10, p. 7; Pl. Exh. 9, pp. 7-14).

Southeast 26th Avenue runs in a north to south direction and S. E. Powell Boulevard in an east to west direction. Southeast 26th Avenue was 36 feet wide with one moving lane for traffic going south and one for traffic going north. Southeast Powell Boulevard was 59 feet wide with two moving lanes for traffic going east and two for traffic going west (Pl. Exh. 33; Def. Exh. 20).

Pate, the insured, was on his way to work as a truck driver, driving his 1961 Pontiac automobile. Brewer was on his way home from work as a service station attendant, driving his motorcycle. Prior to the impact, Pate was driving north on S. E. 26th Avenue intending to turn left, or to the west, at the intersection. Brewer was going south on S. E. 26th intending to go straight through the intersection (Pl. Exh. 9, pp. 4-11, 100-102).

The evidence showed that just before the collision, Pate skidded some 11 to 12 feet from his side of S. E. 26th Avenue and across its center and some 5 feet onto Brewer's side of S. E. 26th Avenue while attempting a left turn across the path of Brewer's oncoming motorcycle. The skid marks led into the debris in the street—the point of debris (or point of impact) being 5 feet west of the center of S. E. 26th Avenue. Evidence on the skidmarks and point of debris was given by Police Officer Tardiff who investigated the accident and who was called as a witness by Brewer (Pl. Exh. 10, pp. 10-15; Pl. Exh. 33).

Officer Tardiff also testified that at the scene of the accident, Pate said that "he had been northbound and that he started to turn left at Powell, saw the lights flicker or the light flicker on the motorcycle and he stated he thought he was stopped at the time of the actual impact of the two vehicles." (Pl. Exh. 10, p. 19). At the trial, Pate did not deny making this statement to the police officer but on direct examination testified he was stopped 5 or 7 seconds before the impact (Pl. Exh. 9, p. 103).

Pate further testified at the trial that he first saw the motorcycle some 20 to 30 feet before it entered the intersection and it looked to him as if it were coming pretty fast so he came to an abrupt stop some 2 or 3 feet over the imaginary center line of S. E. 26th Avenue in the intersection (Pl. Exh. 9, p. 102). He also testified that as he entered the intersection the traffic light turned from green to yel-

low for him (Pl. Exh. 9, p. 102). He located the point of impact as over the center of S. E. 26th Avenue in Brewer's lane of traffic and in the Southwest quadrant of the intersection (Pl. Exh. 9, pp. 116, 117).

On cross-examination, Pate admitted that he first saw the motorcycle when it was at the intersection and admitted that in his deposition he testified that he came to a stop when the motorcycle was 20 to 30 feet from him and admitted in his deposition he had testified he was only stopped a couple of seconds before the impact (Pl. Exh. 9, pp. 109, 110). Obviously Pate tried to change his testimony at the trial from what he had given in his deposition and was caught doing it.

After the jury returned its verdict for Brewer, Mr. Samuels, the insured's trial lawyer, made a report to the insurance company on the trial. Among other things, he pointed out that Pate was "obviously nervous and became quite confused" and pointed out some of the respects in which Pate changed his testimony between deposition and trial (Pl. Exh. 21, pp. 4-5).

Oregon is a conservative jurisdiction where juries do not take kindly to witnesses or parties who change their sworn testimony between deposition and trial (Tr. 122, 123). And yet the insurer and its trial counsel still refused to settle for policy limits of $10,000.00 where the provable specials alone exceeded $12,000.00 and under circumstances where they

knew or should have known that the trial was turning "sour" for their insured (Tr. 116-123).

Brewer testified that he was going 20 to 25 miles per hour as he approached the intersection; that the traffic light was green for him and that when he was 10 to 15 feet from Pate, Pate moved forward, into Brewer's lane of traffic, to complete a left turn in front of Brewer's motorcycle (Pl. Exh. 9, pp. 13, 14, 17, 11, 12).

At the time of the accident, Thomas Curulli was a gas station attendant working on the northwest corner of the intersection. At the time of the trial, Curulli was a sailor in the U. S. Navy stationed in Adak, Alaska (Pl. Exh. 9, pp. 73-74).

Prior to the trial, the insurer knew of Curulli and on September 25, 1962 took a statement from him which made it appear that Curulli knew little or nothing of significance about the accident (Def. Exh. 19; Tr. 282).

At the trial, as an independent witness called by Brewer, Curulli testified that he first noticed the motorcycle when it was about 60 feet from the intersection at which time the traffic light was green for the motorcycle and it was going south on S. E. 26th Avenue at a speed of about 25 miles per hour (Pl. Exh. 9, pp. 75, 76, 78).

Curulli last saw the motorcycle before the impact just as the motorcycle was entering the north side of the intersection at which time the traffic light was

still green for it. At that time he also saw Pate's car just entering the south side of the intersection with its signal light turned on. Pate's car was moving, not stopped. He designated this point of the motorcycle as point 4 and this point of Pate's car as Point 5 on plaintiff's Exhibit 33 (Pl. Exh. 9, pp. 76-87). He then turned to pick up a cup of coffee, heard an impact, turned about abruptly and saw the motorcycle sliding down S. E. 26th Avenue (Pl. Exh. 9, p. 80).

In the Federal court case below, Mr. Samuels, the insurer's trial lawyer in the State court action, at one point, on direct examination indicated that the insurance company had investigated the case very carefully as borne out by the fact that there were no surprise witnesses (Pl. Exh. 10, p. 257). Yet, upon cross-examination he indicated he was surprised at the above testimony of Mr. Curulli because "in the statement we had, as I recall, he said he didn't know much . . ." (Pl. Exh. 10, p. 282).

Again, the trial was turning adversely for the insured. Here, an independent witness showed that Brewer was not running a red light, was not driving at an excessive speed and was not failing to keep a proper lookout or proper control. Here, an independent witness testified that both the car and the motorcycle were both in motion an instant before the impact and that each entered the opposite sides of the intersection at about the same time. Thus Pate could not have been stopped, if at all, for any appreciable time.

And still the insurer and its trial counsel refused to settle for the policy limits of $10,000.00.

Harry Stewart, an independent witness, and the only witness called by the defense other than Pate himself, testified that he was headed east on S. E. Powell Boulevard and had stopped for a red traffic light at the west curb line of S. E. 26th Avenue. He observed the motorcycle coming from the north on S. E. 26th Avenue and continued to watch it. He estimated the speed of the motorcycle at 25 miles per hour (Pl. Exh. 9, pp. 92, 93, 96, 97). After the impact and after the light turned green for him, Mr. Stewart pulled around the corner and stopped (Pl. Exh. 9, pp. 98, 99).

Thus, if the traffic light was red for Stewart, headed east on S. E. Powell Boulevard after the time of impact, it had to be still green for Brewer who was headed south on S. E. 26th Avenue (Pl. Exh. 36).

Stewart also testified that Pate's car was stopped 7 or 8 seconds before the impact. He also placed the impact in the *south-east* and not the *south-west* quadrant of the intersection, contrary to the physical facts of debris and contrary to the testimony of all parties and other witnesses (Pl. Exh. 9, pp. 96, 91, 95). With reference to how long Pate's car had been stopped Stewart admitted on cross-examination that after he first saw the motorcycle he continued to watch it and did not look back at the Pate car (Pl. Exh. 9, p. 97).

As just noted there were obvious weaknesses in Stewart as a witness. He was then followed to the stand by Pate who tried to change his testimony between deposition and trial and became "obviously nervous and became quite confused" as noted earlier.

As the foregoing facts indicate, it cannot be said that the insurer gave as much consideration to the interest of Pate, its insured, (who was facing a judgment for $75,000 plus $12,141.25) as it gave to its own interest of $10,000.

As the foregoing facts indicate, virtually all the risks were thrust upon the insured in the failure to settle before the jury returned with its verdict.

The trial began on Monday, March 30, 1964 and continued on March 31st and April 1st when it was submitted to the jury and on which date the jury returned its sealed verdict which was opened in open court on April 2, 1964 (Pl. Exh. 10, p. 120; Pl. Exh. 4). Thus there was ample time during the course of the trial for the insurer to have effected a settlement within policy limits.

The verdict was in the sum of $42,141.25, apparently being for general damages in the sum of $30,000.00 and special damages in the sum of $12,141.25 (Pl. Exh. 4).

With reference to the insurer's failure to settle *before* verdict this Court's attention is called to the following additional facts:

Immediately after the accident Pate gave the in-

surer a written authorization authorizing the insurer to investigate, negotiate, settle, deny or defend any claim arising out of the accident (Pl. Exh. 13).

Early in September 1962, less than two months after the accident the insurer set up a reserve of $10,00.00 for Brewer's injury (Pl. Exh. 15, 16, 17).

In the summer of 1963, about a year after the accident, a local claim committee of the insurer sitting in Portland, Oregon and composed of William E. Blitsch and Robert Knapp, each of whom were district claim superintendents, recommended that the Brewer claim be settled for $9,500.00 and indicated that the defense of contributory negligence was weak and the charge of negligence against the insured was strong (Pl. Exh. 14; Tr. 50-55). The local claim committee sent this recommendation to Mr. Edward Grant, the insurer's divisional claims superintendent, in its regional office in Salem, Oregon. Mr. Grant called in two other divisional claims superintendents and these three members in Salem were opposed to the recommended settlement if $9,500 (Tr. 57).

Thereupon Mr. Grant decided to have the Brewer file reviewed by its attorneys, Vergeer & Samuels in Portland (Tr. 183, 184).

Accordingly, Mr. Vergeer received the file and wrote an opinion letter dated August 28, 1963 to the insurer (Def. Exh. 24).

In his letter, he advised the insurer to refuse the claim. Contrary to facts which should have been in

the file, Mr. Vergeer assumed that the motorcycle entered the intersection on a yellow light intending to beat the red light; that the motorcycle was traveling at an excessive speed, that Brewer failed to keep a proper look-out or control. He also incorrectly assumed that the insured had been stopped an appreciable time before the impact. In his earlier report to the insurer, the insured himself had stated that he was making a left hand turn and did not see the motorcycle until it had entered the intersection and he, the insured, came to a stop just over the center line (Def. Exh. 21).

Further, in his opinion letter, Mr. Vergeer stated: "Undoubtedly the claimant will testify that the insured turned immediately in front of him and there was no possibility for him to swerve, *and if this were the case, then there would be liability.* This will present a jury question." (Emphasis added) (Def. Exh. 24, p. 2).

At the Federal court trial below, Mr. Vergeer admitted that at the time he wrote his opinion letter he did not have any statement or deposition of Brewer and did not have any deposition of the insured (Tr. 240). He also admitted that he did not know if there was any change of circumstances between the time he wrote his opinion letter and the time the case went to the jury (Tr. 238, 239). He also stated that he never changed his opinion but did not know what happened at the trial itself as he entrusted that to his partner, Mr. Samuels (Tr. 241).

Brewer did testify at the trial and in his deposition that the insured turned immediately in front of him and there was no possibility to swerve so as to avoid the collision (Pl. Exh. 9, pp. 17, 18; Pl. Exh. 26, pp. 19, 20).

The unmodified opinion letter was an uneducated guess that the jury would react against a motorcycle rider and was not a prudent appraisal to defend at the high risk of the insured (Def. Exh. 24).

Also at the Federal court trial below, Mr. Vergeer testified that in deciding to defend he did not consider there was only $10,000.00 coverage and that the insured would have to pick up the rest of it (Tr. 236). This was obviously not giving equal consideration to the interests of the insured.

Just before trial, the insurer offered to settle for $5,000.00, which was less than half of the provable specials and which if accepted (which it was not) would have saved the insurer a part of its coverage in an action seeking more than $80,000.00 from its insured (Tr. 18, 238).

FACTS AFTER VERDICT

As noted earlier, the Federal trial judge herein found that the insurer was careless and negligent and acted in total disregard of the interests of its insured and in bad faith in failing to consummate a settlement for the policy limits *after* verdict and prior to the denial of the motions for new trial (R. 124).

Conclusions of law and a judgment for the liquidated amount of the unpaid excess judgment plus attorney's fees was based thereon (R. 125-128).

In doing so, the appellee does not contend that the trial judge erred except as to the inadequate amount of attorney's fee.

On the other hand, the appellant apparently has attempted to asign such findings, conclusions of law and judgment, *in toto*, as error but does not state particularly wherein the same are alleged to be erroneous (Rule 18).

Consequently, appellee feels compelled to set forth a recital of facts *after* verdict.

After the verdict, Mr. Samuels, the insurer's trial counsel, filed a motion for new trial alleging various errors to have occurred at the trial (Pl. Exh. 7). At that time, he wrote a letter to the insurer showing that the motion was not well-founded nor filed in good faith. Among other things, he stated that the motion was filed "principally for psychological reasons in dealing with Attorney Ryan" and recommended authority from the insurer to pay the amount of coverage as he did not believe there was any possibility to compromise this figure (Pl. Exh. 21, pp. 5, 6).

The insurer did not follow this recommendation to pay the $10,000.00 after verdict and before its motions for new trial were denied (Tr. 287).

On April 3, 1964, the day after the verdict came

in, William E. Blitsch, the insurer's district claims superintendent in Portland, wrote as follows to Edward Grant, the insurer's divisional claims superintendent in Salem:

> "Ed, I just heard about this over the telephone. You have a copy of the file and the judgment was $42,000 and some odd dollars. I recommend that you give me authority immediately to pay our $10,000 so that our man's wages do not become attached."
>
> As far as Mr. Samuels is concerned in my brief conversation with him, we have no particular appeal and as you will recall by looking at the file, Bob and I recommended either $9,500 or $10,000 on this in a claim committee some time back. As far as I can see, we have no alternative but to pay our $10,000 and try to buy peace for our man." (Pl. Exh. 22).

The insurer did not follow this recommendation to pay the $10,000 after verdict and before its motions for new trial were denied (Tr. 73, 287).

After the initial motion for new trial was filed, the insurer's trial counsel shortly thereafter filed amended and supplemental motions for new trial allegedly based upon newly discovered evidence to the effect that Brewer used the false name of Lee D. Breuer at the trial, that he had a criminal record and that his wife had kicked him and injured his leg (Pl. Exh. 7).

On May 5, 1964, Judge Oppenheimer, the State trial judge, denied the motions for new trial.

Thereupon, the insurer's trial counsel wrote to the insurer and admitted that his motions for new trial were weak and ill-founded.

Among other things, he admitted that "unfortunately, we are required to admit that the newly discovered evidence is weak . . ."; that "in spite of all these various convictions and charges and guilty pleas, none of these could be used in circuit court to show that the man had been convicted of a crime . . ."; that "The court felt, quite rightly, that as far as could be shown by the defense, that the man's use of a different name did not prejudice the defendant, as had we known his correct name, such would have divulged nothing further that could have been shown to the jury as defensive material . . ." He also admitted that the alleged incident of the wife causing injury to Brewer was weak and ill-founded (Pl. Exh. 23, pp. 1, 2).

In this letter, the insurer's trial counsel stated that after the order overruling the motions for new trial, "We have attempted to obtain full release by payment of the amount of the coverage, but Attorney John Ryan states that his client will not allow him to do this." Therefore, the insurer's trial counsel advised the insurer to pay the amount of coverage plus interest and costs into the clerk of the court (Pl. Exh. 23, p. 2).

He further stated, "We have advised the defendant (the insured) as to the procedure taken herein, and know that he is fully prepared to file bankrupt-

cy if plaintiff (Brewer) levies on his salary (Pl. Exh. 23, p. 2).

On May 15, 1964, Pate, the insured, signed a debtor's petition (prepared by Mr. Samuels, the insurer's trial counsel) to be adjudged a bankrupt.

Pate died on May 17, 1964.

On May 18, 1964, Mr. Samuel's office caused the petition to be filed, not having been informed of Pate's death.

On May 21, 1964 the petition was dismissed by the bankruptcy court, on receipt of information that Pate's death preceded the filing of the petition (Pl. Exh. 46, R. 124, 125).

At the Federal court trial below, John Ryan, Brewer's attorney, testified that after the initial, amended and supplemental motions were filed and before Judge Oppenheimer denied these motions on May 5, 1964, he contacted Mr. Samuels on two occasions, and pursuant to authority from his client, Brewer, offered to settle the judgment for Pate's policy limits but that Mr. Samuels refused to do so (Tr. 21-25).

The first occasion, after the verdict, in which Mr. Ryan offered, on the telephone, to settle Brewer's case for the policy limits was on April 16, 1964 or the day before April 17, 1964 when Judge Oppenheimer held the first hearing on the motions for new trial. Mr. Ryan on behalf of, and with the authority

of Brewer, offered to settle the $42,000 judgment for Pate's policy limits (Tr. 21-24).

Mr. Samuels, the insurer's counsel, refused to settle (Tr. 24).

The second occasion on which Mr. Ryan offered to settle Brewer's case for the policy limits was on April 17, 1964, immediately after the first hearing on the motions for new trial, and while Mr. Ryan and Mr. Samuels were drivng back to Mr. Ryan's office in Mr. Samuel's automobile (Tr. 24, 25).

Again, Mr. Samuels refused to settle and said he would not settle with a perjurer (by which he meant he would not settle with a man who used two names) (Tr. 25).

At the Federal court trial below, Mr. Samuels denied categorically that Mr. Ryan or anyone else on behalf of Brewer, had ever offered to settle the Brewer case for the policy limits between the time of verdict and the denial of the motions for new trial (Tr. 267, 279, 280). On cross-examination, he was confronted with his sworn testimony in deposition regarding the Ryan offer of settlement after verdict, in which he stated, again and again, "I don't recall on that . . ." or "no recollection." (Tr. 280, 291, Pl. Exh. 29, pp. 31-34).

He did recall on the stand one or more automobile rides from the courthouse with Mr. Ryan and that he thought he used the word "perjury" or "something along that line on the part of his man on the

false name, but there was no discussion about any settlement at that time." (Tr. 267, 268).

He was also confronted with Mr. Ryan's letter of May 5, 1964, written and mailed the same evening after the motions for new trial were denied (Pl. Exh. 12).

He admitted reeciving this letter (Tr. 269). The letter read as follows:

> "'Dear Mr. Samuels:
> You have failed to accept or pay our offers to take the policy limits of your client *on the above judgment*, and, therefore, the previous offers to settle this case have been withdrawn and we are proceeding to collect the full amount of our judgment herein without further notice of our action herein." (Emphasis added)

Obviously the letter referred to offers of settlement "to take the policy limits of your client *on the above judgment.*" There could be no judgment until *after* verdict, so obviously, Mr. Ryan made offers (plural) to settle for policy limits *after* verdict. Mr. Samuels never refuted the receipt of the letter (nor the phraseology of the letter after he received it and long before the excess judgment action was commenced in Federal court).

Mr. Samuels further admitted on cross-examination that he took no initiative to settle the case for policy limits between verdict and denial of the motions for new trial (although, admittedly, as shown above, the motions were weak and ill-founded and

filed for psychological reasons in dealing with Attorney Ryan) (Tr. 286, 287).

He also admitted that if there had been an offer to settle for the policy limits it would have been the prudent, wise thing to have accepted that offer (further indicating that the motions were ill-founded) (Tr. 287).

In any event, the Federal trial judge, weighed the credibility and powers of recollection of Mr. Samuels and Mr. Ryan and elected to believe Mr. Ryan that there had been offers to settle for the policy limits after verdict and before denial of the motions for new trial. He relieved Mr. Samuels more gently than his direct and cross-examination called for (Tr. 321, 322).

As noted earlier, Mr. Samuels in his letter of May 11, 1964 stated that after denial of the motions for new trial, Brewer, through his attorney Ryan, refused to give a full release by payment of policy limits (Pl. Exh. 23, p. 2).

Finally, after denial of the motions for new trial, the insurer did not appeal but threw in the towel, paid its policy limits plus costs and interest into the registry of the court in partial satisfaction of the judgment (Pl. Exh. 34).

The insurer's attorneys then filed bankruptcy for its insured (Pl. Exh. 46).

ATTORNEY'S FEES

After both parties rested below, the question of the allowance of attorney's fees came up. In response to the Federal trial judge's question, "Does the defendant dispute that attorney's fees are allowed in this sort of action," the attorney for the insurer replied as follows:

> "MR. SKOPIL: I think we have no dispute with the fact that I am sure under the statute attorney's fees would be allowable. The only point we raised was in the preliminary stages of this, and that is the complaint was filed prior to the expiration of the six months, as required by the statute. Subsequently there was a motion for leave to amend to include attorney's fees, which was argued and allowed by the Court.
>
> Now, I feel that under the statute, if the plaintiff were to prevail, that he would, if he has met the requirements of that statute be entitled to attorney's fees." (Tr. 315).

Now, however, on this appeal the insurer takes the position that no attorney's fees at all were allowable.

Counsel for the administrator emphasized to the Federal trial judge that he had undertaken this case under a contingency fee arangement, which, pursuant to the Oregon State Bar regulations, would be 40% of the recovery. He also urged that in this type of case there was no doubt of the amount of recovery. It is either nothing or the liquidated sum of $31,979.98, which was the amount of the unpaid ex-

cess judgment and which was also the amount of the valid claim allowed by the probate judge against the insured's estate (Tr. 317). This amount and the computation of the attorney's fee thereon in the exact sum of $12,791.75 were carefully pleaded in the pretrial order (R. 84).

Counsel for the administrator also advised the Federal trial judge that the Oregon Supreme Court had approved of a contingency fee arrangement in a similar action against an insurer for violation of its contractual obligations (Tr. 318).

Contrary to this position, the Federal trial judge announced that he would not approve of a contingent fee arrangement but did not question the minimum bar schedule (Tr. 319, 318).

Subsequently, the Judge, in his findings, allowed counsel for the administrator an inadequate fee of only $4,000.00.

One of the appellee's grounds of cross-appeal herein is the repudiation by the Federal trial judge of the contingent fee arrangement, in the face of its prevailing allowance by the Oregon Supreme Court in a similar type of case, and the inadequacy of the award in a major, difficult case, such as this has been.

The record, herein, bespeaks of a long, complicated case involving much discovery, work and study and a case made more involved by some of the insurer's maneuvers (see for example, motion to dismiss, R. 7-25; opposition to supplemental complaint, R. 30-35).

POINTS AND AUTHORITIES

(1) Plaintiff, as the duly appointed, qualified and acting administrator of the estate of William Ira Pate, deceased, is the proper party plaintiff to maintain this action against Pate's insurance company for failure to settle the personal injury claim and action against Pate within Pate's policy limits.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);

Jessen v. O'Daniel, 210 F. Supp. 317 (DC Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'-Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);

Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295 (4th Cir., 1961);

Sweeten v. National Mutual Insurance Co. of D. C., 233 Md. 52, 194 A.2d 817 (1963).

(2) Having been duly appointed administrator of Pate's estate and Judge Dickson of that Court having examined and allowed the claim of Brewer, plaintiff, in the personal injury action, in the sum of $31,979.38 (representing the unpaid balance of the excess judgment against Pate), the plaintiff administrator herein is under a fiduciary duty to the estate and to its creditors and heirs to pursue this action against the insurer and to collect all that is owed to the estate.

ORS 116.130;

Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295, 296 (4 Cir., 1961);

Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);
Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);
Also see: Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966).

(3) It is not necessary that the estate should first pay this claim of $31,979.38 on account of the unpaid excess personal injury judgment against Pate or that it should have sufficient assets to do so, before the administrator of Pate's estate can maintain this action against Pate's insurer.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);
Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295 (4 Cir., 1961);
Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);
Sweeten v. National Mutual Insurance Co. of D. C., 233 Md. 52, 194 A.2d 817 (1963).

(4) Payment of excess personal injury judgment by insured or his estate is not a pre-requisite to maintenance of an action against the insured as mere excess liability of the judgment establishes damages and is the measure thereof. This is analogous to the gen-

eral rule that a plaintiff who incurs a reasonable medical or hospital expense may recover against negligent defendant therefor even though such expense was not paid, at all, or not paid by plaintiff. Also to require prepayment of excess by insured or his estate would be a windfall to an insurer with insolvent insureds and would induce an insurer to be less responsive to the fiduciary duties owed to its insureds.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);

Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont., 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60 (9 Cir., 1964);

Lee v. Nationwide Mutual Insurance Co., 286 F.2d 295 (4 Cir., 1961);

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);

Gray v. Nationwide Mutual Ins. Co., 422 Pa. 500, 223 A.2d 10 (1966);

Brown v. Guarantee Insurance Co., 155 Cal. App. 2d 679, 319 P.2d 69 (1958);

Wesing v. American Indemnity Co., 127 F. Supp. 775 (D.C. Mo., 1955);

Alabama Farm Bureau Mut. Casualty Insurance Co. v. Dalrymple, 270 Ala. 119, 116 So. 2d 924 (1959);

Sweeten v. National Mutual Insurance Co. of D. C., 233 Md. 52, 194 A.2d 817 (1963);

Southern Fire & Casualty Co. v. Norris, 35 Tenn. App. 657, 250 S.W.2d 785 (1952);

Cary v. Burris, 169 Or. 24, 127 P.2d 126 (1942).

(5) The Oregon Supreme Court has held that an insurer owes to its insured the duty of due diligence and good faith, and, in determining whether to settle claims against the insured, the insurer must act as if it were liable for the entire judgment that might eventually be entered against the insured. In addition, only a decision in the exercise of due diligence to reject an offer of settlement is deemed as made in good faith.

Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);

American Fidelity & Casualty Co. v. L. C. Jones Trucking Co., — Okla. —, 321 P.2d 685, 687 (1957);

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 5 Cal. Rep. 488 (1960);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);

Gray v. Nationwide Mutual Ins. Co., 422 Pa. 500, 223 A.2d 8 (1966);

See also:

7A Appleman, "Insurance Law and Practice," §§ 4711, 4712.

(6) Basis of liability, in both contract and tort, arises out of the insurance contract which gives the insurer the exclusive right to negotiate settlement of claims and defend actions against the insured. The insurer stands as a fiduciary or trustee or agent to

its insured and its duty of due care and good faith are judged in that context and under the policy.

Evans v. Continental Casualty Co., 40 Wash. 2d 614, 245 P.2d 470, 480 (1952);

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);

Jessen v. O'Daniel, 210 F. Supp. 317 (D.C. Mont. 1962); aff'd in National Farmers Union Property & Casualty Co. v. O'Daniel, Adm., 329 F.2d 60, 64, 65 (9th Cir., 1964);

38 Am Jur 661, 662, "Negligence," § 620;

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(7) Where insured is sued for an amount in excess of his coverage there is a necessary conflict of interest between insured and his insurer and courts take this into consideration in determining if insurer improperly rejected offer of settlement and therefore closely scrutinize the insurer's conduct.

Radcliffe v. Franklin National Insurance Co., 208 Or 1, 21, 22, 298 P.2d 1002 (1956);

Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 25 (6 Cir., 1960);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(8) In actions of this kind mere terminology of "negligence" and "bad faith" is not determinative. It is rather the factual situation which is significant in light of the duty which rests on the insurer

under the policy. The terms are often used interchangeably and negligent conduct is deemed indicative of bad faith.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);
7A Appleman, "Insurance Law and Practice," 576, 577, § 4712.

(9) Bad faith in this type of case does not mean fraud, nor is it the equivalent of fraud and need not be proved by clear and convincing evidence as preponderance of evidence is sufficient. Bad faith is a term applied to a great variety of acts or omissions which equity regards as wrongful, such as failure to give equal regard to the best interest of the insured or the intentional disregard of insured's financial interest in the hope of escaping the full responsibility imposed on the insurer.

American Fidelity & Cas. Co. v. Greyhound, 258 F.2d 709, 713, 714 (5 Cir., 1958);
Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(10) Where insurer chose to ignore strong evidence of negligence on insured's part as revealed at the trial (Pate skidded some 11 or 12 feet from his side of the road some 5 feet onto Brewer's side of the road while attempting a left turn in front of

Brewer) and where proof of contributory negligence was weak or non-existent and where insurer knew injuries were serious and permanent and provable specials alone exceeded policy limits and insurer still refused to settle for policy limits, such conduct proves negligence and bad faith on part of insurer.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);

Western Cas. & Surety Co. v. Fowler, — Wyo. —, 390 P.2d 602 (1964);

Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21 (6 Cir., 1960);

American Fidelity & Casualty Co. v. G. A. Nichols, 173 F.2d 820 (10 Cir., 1949);

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 5 Cal. Rep. 488 (1960);

Alabama Farm Bureau Mut. Cas. Ins. v. Dalrymple, 270 Ala. 119, 116 So. 2d 924 (1959).

(11) In good faith, insurer may not refuse settlement if it knows it has no more than 50-50 chance of winning case and that if there is a verdict against the insured it would exceed policy limits (see admissions of insurer's attorney thereon in Plaintiff's Exhibit 21, p. 5).

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);

See also:

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 5 Cal. Rptr. 488 (1960).

(12) Where primary negligence of insured is clear (he skidded some 11 or 12 feet from his lane of traffic some 5 feet into Brewer's lane of traffic while attempting a left turn in front of Brewer) and where evidence of contributory negligence is weak or non-existent and where injuries were serious and permanent and special damages exceeded policy limits there would be a clear showing of bad faith for failure to settle even if insurer's lawyer had estimated that insured had better than 50-50 chance for defense verdict which estimate he could not and did not make here (Pl. Exh. 21, p. 5).

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 401, 5 Cal. Rptr. 488 (1960).

(13) In the present situation, where a defendant's verdict was doubtful as best and the trial was going adversely against insured and where the injuries were admittedly serious and permanent, the amount of provable specials exceeded the policy limits and where the general damage sought was $75,000.00, the insurance company, in rejecting a $10,000.00 offer to settle thrust virtually all of the risk upon the insured and did not consider his best interest equally with its own. Such conduct constitutes bad faith.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 22, 40, 43, 298 P.2d 1002 (1956);
Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967);
Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 34 (6 Cir., 1960);
Springer v. Citizen's Cas. Co. of N. Y., 246 F.2d 123, 128 (5 Cir., 1957).

(14) Bad faith indicated where insurer is gambling against a larger verdict being imposed on its insured while trying to save a comparatively smaller amount of its own money.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 34 (6 Cir., 1960);
Springer v. Citizen's Cas. Co. of N. Y., 246 F.2d 123 (5 Cir., 1957);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(15) The degree of due care which must be exercised by an insurer in rejecting an offer of settlement within policy limits is commensurate with the degree of risk of an excess judgment against its insured and the insurer must act as if it were liable for the entire judgment that may eventually be rendered.

Radcliffe v. Franklin National Insurance Co., 208 Or. 1, 298 P.2d 1002 (1956);
Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 97 N.W.2d 168 (1959);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(16) Where insurer rejects reasonable offer of settlement within policy limits such refusal is a manifestation of bad faith towards insured's interest.

J. Spang Baking Co. v. Trinity Univ. Ins. Co., 45 Ohio Law Ab. 577, 68 N.E.2d 122, 126 (1946);
Henke v. Iowa Home Mutual Casualty Co., supra;
Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 394, 5 Cal. Rep. 488 (1960);
Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1960).

(17) Bad faith and negligence may be shown by direct or circumstantial evidence.

Radcliffe v. Franklin National Insurance Co., supra, 298 P.2d 1002 (1956).
Tenn. Farmers Mutual Insurance Co. v. Wood, 277 F.2d 21, 25, 35 (6 Cir., 1960).

(18) Actual verdict of $42,141.25 is evidence of what the insurer may have anticipated if it had given the offer of settlement proper consideration.

Davy v. Public National Insurance Co., 181 Cal. App. 2d 387, 401, 5 Cal. Rep. 488 (1960);

Crisci v. The Security Insurance Company of New Haven, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

(19) Insurer had absolute authority to settle case within policy limits and insured had no power to either compel insurer to make such settlement or to prevent it from doing so.

7A Appleman, "Insurance Law and Practice," 576, § 4711;

Radcliffe v. Franklin National Insurance Co., supra, 298 P.2d 1002 (1956);

Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A.2d 57, 62 (1947).

(20) Insurer's improper rejection of offer of settlement within policy limits is not excused because insured did not demand acceptance as insurer had full power in the matter and must perform its professional duty without being activated by insured.

Highway Insurance Underwriters v. Lufkin-Beaumont Motor Coaches, — Tex. Civ. App. —, 215 S.W.2d 904, 929 (1948);

State Farm Mutual Automobile Insurance Co. v. Jackson, 346 F.2d 484, 490 (8 Cir., 1965);

7A Appleman, "Insurance Law and Practice," 553, § 4711.

(21) Insurer has even greater duty to accept offer of settlement after judgment than offer of set-

tlement before verdict, both of which were within policy limits (as was true here), since under such circumstances, motion for new trial, even if successful, could only benefit insurer. Thus to rely on motion for new trial, facts for allowance must be very strong and chances of success correspondingly greater than chances of failure which was not so here.

Hazelrigg v. American Fidelity & Cas. Co., 241 F.2d 871, 873 (10 Cir., 1957) (dictum);

7A Appleman, "Insurance Law and Practice," 557, § 4711.

(22) Where liability of insured is clear, as it was here, both before verdict and after verdict, it is evidence of bad faith if insurer fails to take the initiative to make an earnest and prompt attempt to settle the case for its reasonable value.

Henke v. Iowa Home Mutual Casualty Co., 250 Iowa 1123, 98 N.W.2d 168, 174 (1959).

(23) Negligence and bad faith of attorneys retained by insurer is imputed to insurer.

Dumas v. Hartford Accident & Indemnity Co., 94 N.H. 484, 56 A.2d 57, 61 (1947);

Attleboro Man'f Co. v. Frankfort Marine Acc. & Plate Glass Ins. Co., 240 F. 573 (1 Cir., 1917);

Smoot v. State Farm Mutual Automobile Ins. Co., 299 F.2d 525 (5 Cir., 1962).

(24) Both state and federal courts within the

intendment of ORS 736.325, have been liberal in allowing attorney's fees, at both trial and appellate levels, to prevailing plaintiffs in various actions for violations by insurers of the terms of their policies. The action here was for the violation by insurer of its contractual obligation to solely control settlements under its policy and attorney's fees are allowable herein.

Pl. Exh. 11—insurance policy;
State v. Claypool, 145 Or. 615, 28 P.2d 882 (1934);
Tierney v. Safeco Ins. Co. of America, 216 F. Supp. 590 (D.C. Or., 1963);
Staff Jennings, Inc. v. Firemen's Fund Ins. Co., 218 F. Supp. 112 (D.C. Or., 1962);
Denley v. Oregon Auto Ins. Co., 151 Or. 42, 47 P.2d 245, 47 P.2d 946 (1935);
Journal Publ. Co. v. General Cas. Co., 210 F.2d 202, 204 (9 Cir., 1954);
Kuzmanich v. United Fire & Casualty Co., 242 Or. 529, 410 P.2d 812 (1966);
American Fidelity & Casualty Co. v. Greyhound, 258 F.2d 709, 717, 718 (5 Cir., 1958);
American Fire & Casualty Co. v. Davis, — Fla. —, 146 So. 2d 615 (1962).

(25) The district court erred in not abiding by a contingent fee arrangement, valid in Oregon, and in only allowing an attorney's fee in the sum of $4,000.00 instead of in the sum of $12,791.75 as prescribed by Minimum Fee Schedule of the Oregon State Bar.

Denley v. Oregon Auto Ins. Co., 151 Or. 42, 47 P.2d 946 (1935);
ORS 9.010;
ORS 41.360 (15).

SUMMARY OF ARGUMENT

The trial court did not err in allowing judgment for the full amount of the excess judgment plus attorney's fees but did err in not also basing his judgment on the further ground that the insurer had acted negligently and in bad faith *before* the verdict as well as *after* the verdict and did err in allowing only $4,000.00 instead of $12,791.75 as attorney's fees below.

ARGUMENT

The facts, mostly in the form of written exhibits and the transcript (Pl. Exhs. 9 and 10) of the State court trial, clearly shows that the insurer acted negligently and in bad faith both *before* verdict and *after* verdict in not settling within policy limits.

Extensive argument thereon should not be necessary. The Federal trial judge based the judgment against the insurer solely on the negligence and bad faith of the insurer *after* veridct. As to what transpired *before* verdict, he found was not negligence or bad faith but rather the exercise of reasonable care, skill and diligence of a prudent casualty insurance company in its decision to submit the case to the jury (R. 123).

Such findings as to the conduct of the insurer *before* verdict were clearly erroneous.

The conduct of the insurer *after* verdict was so shockingly callous in its disregard of the insured's interest that the Judge may have felt he would be prudent and play it safe in forestalling a costly and time-consuming appeal by solely basing the judgment against the insurer thereon. Perhaps, he reasoned that no insurer would want such outrageous conduct permanently spread upon the pages of an appellate court decision. If so, he was "out-reasoned" by State Farm; for here we are.

The Federal trial judge in his findings in favor of the insurer *before* verdict was clearly erroneous as shown by the recital of facts heretofore made. As there pointed out, and as shown by exhibits including the transcript of the State court trial, the insurer did not act prudently and with equal regard for the interests of the insured. On the contrary, it thrust the major portion of the risk on its insured in the hope (fatal as it proved to be to the insured) of saving a part or all of its $10,000.00 coverage.

In that connection, it will be recalled that one of the insurer's counsel, in August 1963 some 7 months before trial, wrote an opinion letter to reject Brewer's claim and go to trial (Def. Exh. 24). This opinion letter, as to facts already in the insurer's file or which should have been, misconstrued the same or negligently assumed that the motorcycle entered the intersection on a yellow light intending to beat a red

light and that the motorcycle was travelling at an excessive speed and that Brewer failed to maintain a proper lookout or control. It also assumed incorrectly that the insured had been stopped an appreciable time before impact.

It ignored or played down the cold, hard facts that the insured had skidded 11 or 12 feet from his side of the road some 5 feet across the center and across the path of the oncoming motorcycle thereby failing to yield the right of way and all while the insured was attempting a left turn in the face of the oncoming motorcycle (Def. Exh. 24).

These cold, hard facts appeared in the official police investigating report to which the insurer had access (Def. Exh. 20). Also, if the insured were stopped an appreciable time why did he not back up and out of the motorcycle's rightful lane of traffic?

Mr. Vergeer, the writer of the opinion letter, admitted below on cross-examination that at the time he wrote the opinion letter he had no statement or deposition from Brewer and no deposition from Pate, the insured (Tr. 240). He thus had no way to appraise the story of either party under oath. He thus had no way to appraise the kind of a witness either party would make under oath and under cross-examination. As it turned out before verdict, Brewer made an excellent witness while Pate became nervous and confused as he tried to change his story between deposition and trial (Pl. Exh. 21; Pl. Ex. 9, pp. 108-117—cross-examination of Pate).

Mr. Vergeer also admitted below in cross-examination that he did not know if there were any changes of circumstance between the time he wrote his letter and some 7 months later when the case went to the jury (Tr. 238, 239). He also further stated that he never changed his opinion to submit the case to a jury (nor did the insurer) but he did not know what happened at the trial itself as he turned the trial of the case over to his partner, Mr. Samuels (Tr. 241).

Like a stock broker predicting the market 7 months in advance, Mr. Vergeer hedged in his opinion letter when he stated, "Undoubtedly the claimant will testify that the insured turned immediately in front of him and there was no possibility for him to swerve, *and if this were the case, then there would be liability.* This will present a jury question" (Def. Exh. 24, p. 2; emphasis added). Not only did the claimant (Brewer) so testify but the skid marks, debris and other physical facts bore out his testimony.

Examination of the unmodified opinion letter shows that it was, in good measure, an uneducated guess on how a jury would violate its sworn duty to decide the facts but instead would prejudicially and viscerally react against a motorcycle rider (Def. Exh. 24). Such an appraisal was far less prudent than the appraisal of the insurer in the *Crisci* case to let the jury pick and choose between the testimony of psychiatrists on opposite sides of the case. (*Crisci* v. *The Security Insurance Company of New Haven,* 58 Cal. Rptr. 73, 426 P.2d 173, 178 (1967).

The opinion letter also over-rode the recommendation of Mr. Blitsch and Mr. Knapp, two of the insurer's district claims superintendents, to settle for $9,500.00 (Tr. 58). Also, at the time Mr. Vergeer received the file, preparatory to writing his opinion letter, he received a cautionary letter from Mr. Knapp that there is negligence on the part of the insured with only "some possible negligence" on the part of the claimant, but the severity of the injuries overshadows the element of contributory negligence and it would appear to be a jury question" (Def. Exh. 2). Obviously, Mr. Vergeer had more faith in reading his crystal ball (clouded as it was) on the jury's adverse reaction to a motorcycle and his hunch that the jury would not do what jurors are supposed to do (Def. Exh. 24).

Right before trial, the insurer offered to settle for $5,000.00, which was not accepted. This offer would appear to be an attempt to save a part of its coverage. In making such an unacceptable offer, in an attempt to save a few dollars of its own, the insurer was thrusting virtually all the risk on the insured and was not thereby giving the rightful interest of its insured equal consideration with its own, thereby demonstrating its bad faith before verdict (See P & A, (5) through (18), supra).

After the trial started, events began to go badly for the insured. The many instances in which the trial of the case turned "sour" for the insured have heretofore been detailed under the "Statement of Facts." There is no need to repeat those details. They

are verified by the transcript itself of the State court trial (Pl. Exhs. 9, 10).

The insurer still had a chance to settle for policy limits and save the day for its insured (Tr. 18).

And still the insurer remained adamant in its refusal to settle for policy limits before verdict.

In sticking to its unreasonable refusal to so settle, the insurer violated its obligation under the sole control it had over such a settlement by the contractual terms of its policy. Its violation of its sole control over settlement were shown by its negligence and bad faith in refusing to settle when it realized, or should have realized, that the opinion letter was not, at its conception, prudently based on facts (existent or non-existent) and that the continued refusal to settle was not based upon the turn of events adversely to its insured, at the trial, and that the true course of events demanded, in the exercise of due care and good faith, a settlement for the policy limits (See P&A (5) through (18), *supra*).

Little has been said in this argument about applying the foregoing Points of Law on the duty of the insurer to use due care and good faith in refusing to settle within policy limits.

There are only two Oregon Supreme Court decisions in excess judgment cases. They are *Radcliffe* v. *Franklin National Insurance Co.*, 208 Or. 1, 298 P.2d 1002 (1956) and *Kuzmanich* v. *United Fire & Casualty Co.*, 242 Or. 529, 410 P.2d 812 (1966). No at-

tempt is made in this brief to pick and quote at random various sentences or phrases therefrom. Instead the principles, enunciated by both decisions, and supported by cases from other jurisdictions, have been digested under the foregoing Points and Authorities.

The various nuances and application of the principles of law that the insurer not act negligently and in bad faith can be readily applied by this Court to the facts proved herein.

In any event, it should be sufficient to caution that "bad faith" in an excess judgment case does not mean "fraud" or the equivalent of "fraud." Rather, "bad faith" is applied to a great variety of acts or stopped an appreciable time why did he not back up omissions where the courts regard as wrongful as such conduct as failure to give equal regard to the best interest of the insured or the intentional disregard of the insured's financial interest in the hope of escaping the full responsibility imposed on the insurer (See P & A (9), *supra*).

It should also be enlightening to call attention to two recent cases, in particular, on the liability of an insurer in an excess judgment situation. These cases are: *Gray* v. *Nationwide Mutual Ins. Co.*, 422 Pa. 500, 223 A.2d 10 (1966) and *Crisci* v. *The Security Insurance Company of New Haven*, 58 Cal. Rptr. 13, 426 P.2d 173 (1967).

The *Gray* case affirms the modern, better-resolved viewpoint, that pre-payment of the excess judgment is not a pre-requisite to an excess judgment action

and is *aggiorimento* in opening the door to the fresh breezes of a direct assignment of the insured's cause of action for wrongful conduct of the insurer to the injured claimant.

The decision of the highly-regarded California Supreme Court in the *Crisci* case elucidated and clarifies what is meant by the duty and obligation of the insurer not to act negligently and in bad faith in refusing to settle within policy limits. This decision is in accord with, and builds upon, the decisions of the Oregon Supreme Court in the earlier *Radcliffe* and *Kuzmanich* decisions cited above.

The *Crisci* decision is especially helpful on the application of the principle of "bad faith" and "negligence" on the part of the insurer. The *Crisci* decision is likely to become a "landmark case" in the field of excess judgment litigation just as the two decisions by the same eminent Court in *Greenman* v. *Yuba Power Products*, 377 P.2d 897 (Cal., 1962) and *Vandermark* v. *Ford Motor Co., et al*, 391 P.2d 168 (Cal., 1964) have become landmark decisions in the field of products liability.

On the subject of damages and attorney's fees allowable herein, the discussion must be more extensive on both the facts and the law. This is or, because, at the conclusion of the testimony below, the Federal trial judge requested more information on both subjects and the insurer has purportedly specified errors on both subjects (Tr. 315 et seq). Shortly following the Federal court trial below, the writer,

who was also trial counsel for appellee below, submitted a memorandum on the law of damages and attorney's fees some 15 pages in length (R. 129-144). There is no need or space herein for that much detail.

DAMAGES

With reference to damages, in allowing recovery for the full amount of the unpaid judgment even though the plaintiff or insured in an excess judgment action has not paid the same or any part thereof or is without assets to do so, one of the leading cases was decided by this Court in 1964, in affirming Judge Jameson of the Montana District Court. That case is *National Farmers Union Property and Casualty Co.* v. *O'Daniel, Adm.*, 329 F.2d 60 (9 Cir., 1964) affirming *Jessen* v. *O'Daniel*, 210 F. Supp. 317 (D.C. Mont., 1962).

The *O'Daniel* case is important for several reasons. In the first place, the facts therein are similar to those in the case at bar. In the second place, the insurer therein relied strongly on the case of *Harris* v. *Standard Accident & Ins. Co.*, 297 F.2d 627 (2 Cir., 1961) as does the insurer herein.

In *O'Daniel*, the District Court distinguished and refused to follow *Harris* and this Court, although its attention was called to *Harris* ignored *Harris* and instead cited *Brown* v. *Guarantee Insurance Co.*, 155 Cal. App. 2d 670, 319 P.2d 60 (1958) in upholding the right of the estate to maintain its action without paying or being able to pay the excess judgment in

the sum of $25,000.00. On this score and on the subject of damages the Ninth Circuit ruled as follows:

> "National (insurer) contends that this action cannot be brought until the estate has paid the excess judgment. Although there is a conflict among the authorities on this question, a more modern and better reasoned view is that the cause of action arises when the insured incurs a binding judgment in excess of the policy limits. Likewise, we see little merit in the contention that the estate has not been damaged beyond its value, even though the judgment may exceed the value of the estate by more than one hundred per cent. It is obvious that if National were to reimburse the estate for the value of the assets paid to Jessen, Jessen could levy on the estate for the reimbursement money and there would still be no assets left in the estate. This also disposes of the contention that Jessen is the real party in interest and not a proper party. The estate is the party that was damaged by the personal injury judgment and the estate is the party that brought the cross complaint against National." (329 F.2d 60, 66)

The facts in *O'Daniel* were briefly these: Jessen, while driving his car, was injured in Montana when he had an accident with a truck owned by O'Daniel. Jessen was awarded $35,000.00 in his State court action against O'Daniel. At the time of the accident O'Daniel had a $10,000.00 liability policy on the truck. The State court judgment of $35,000.00 was affirmed by the Montana Supreme Court. Thereafter, National (O'Daniel's insurer) paid Jessen the full

$10,000.00 coverage plus court costs and interest. O'Daniel died without having made any payment himself on the judgment. After filing a claim for the excess of the judgment over the $10,000.00 against O'Daniel's estate, Jessen brought suit in the Montana State court on the judgment against O'Daniel's estate. The administrator of the estate answered and filed a cross complaint against National for negligence and bad faith in failing to settle the personal injury case within the policy limits. National removed the case to Federal court on diversity grounds.

The Federal district court awarded Jessen $25,000.00 on his complaint and awarded the administrator $23,000.00 on his cross complaint (The Court deducted $2,000.00 from the amount awarded the administrator because at the time of trial O'Daniel was willing to contribute $2,000.00 to settle the case).

To the same effect in holding that incurring a binding judgment in excess of policy limits is the damage and that payment or the ability to pay all or part of the same is not a pre-requisite to maintaining an action against the insurer for wrongful refusal to settle see: *Henke* v. *Iowa Home Mutual Casualty Co.*, 250 Iowa 1123, 97 N.W.2d 168 (1959); *Lee* v. *Nationwide Mutual Insurance Co.*, 286 F.2d 295 (4 Cir., 1961); *Sweeten* v. *National Mutual Insurance Co. of D. C.*, 233 Md. 52, 194 A.2d 817 (1963). Other cases on the same points are collected under P & A (3), (4), *supra.*

The insurer herein relies upon *Harris* v. *Standard*

Accident & Insurance Company, 297 F.2d 627 (2 Cir., 1961) in support of its contention that the insured has not been damaged because the excess judgment has not been paid and the insured's estate is without sufficient funds to do so.

In *Harris*, the action was by the trustee in bankruptcy. The District Court awarded the trustee $89,000.00, the full amount of the unpaid excess judgment.

On appeal, the Second Circuit by a divided panel, reversed on the ground of failure to show any damages since the insureds were insolvent before the excess judgment was rendered, did not pay any part of it, and were discharged in bankruptcy from any future obligation to pay it.

The court attempted to distinguish the California *Brown* case (*supra*) by saying that in *Brown* there was no evidence that the insured was insolvent before the excess judgment as were the insureds in *Harris*.

The court went on to say that if the insured was not insolvent before the excess judgment and if he had any excess of assets over liabilities exclusive of the excess judgment, then the insured could recover the full amount of the excess judgment because a full recovery thereof would be necessary to make the insured whole; that is to place him in a position where his net assets (however small) are as great after as before the rendition of the excess judgment (297 F.2d 632).

At this juncture, we might note that there is no evidence in the case at bar that Pate was insolvent before the $42,141.25 judgment was rendered. To the contrary, as the evidence herein shows, he was solvent (exclusive of the excess judgment), was employed as a truck driver and had been so employed for a period of 24 years (Pl. Exh. 9, pp. 100; Pl. Exh. 46). The Federal district judge here in his Findings of Fact (6) found that "Pate's assets exceeded his liabilities by the sum of approximately $2,000.00" and that he claimed these assets as exempt from the claims of creditors under the Oregon exemption law in his bankruptcy petition. The only obligation, other than the unpaid judgment, was a single debt in the sum of $100.00 (R. 124, 125).

Under the agreed facts in the pre-trial order herein it is stipulated that the appraised value of the assets of Pate's estate apart from the value of this law action against State Farm is in the sum of $461.18. Appellant in its brief sets forth the Oregon Probate Code on preferred and ordinary claims and attempts to infer that there are preferred claims herein (App. Br. pp. 13, 14). There is not a scintilla of evidence in the record of any such preferred claims. The only evidence of a claim against the Pate estate is the unpaid excess judgment claim of $31,979.38 (R. 76; Pl. Exh. 32).

Apart from the unpaid excess judgment claim, there are some net assets in the Pate Estate and apart from the excess judgment Pate was not insol-

vent in life or upon death. Thus even under the reasoning in *Harris* the estate of the insured herein has been damaged by the full amount of that judgment.

Also in *Harris* the court grounded its ruling of no damages on a peculiar New York rule of damages which does not exist in Oregon. This peculiar rule is to the effect that there must be proof of actual loss and that an injured party cannot recover for unpaid medical expenses if there is a showing that he is unable to pay them. Oregon has no such oddity in its law. (*Cary* v. *Burris*, 169 Or. 24, 127 P.2d 126 (1942)).

Apparently no other circuit court has followed the *Harris* case and many courts have either distinguished, ignored or refused to adopt its holding. See for example: *O'Daniel, supra; Sweeten, supra; Anderson* v. *St. Paul Mercury Indemnity Co.*, 340 F.2d 406 (7 Cir., 1965); *Wooten* v. *Central Mutual Ins. Co.*, — La. —, 182 So. 2d 146 (1966); *Smoot* v. *State Farm Mutual Automobile Ins. Co.*, 299 F.2d 525 (5 Cir., 1962).

In the *Wooten* case, the court refused to follow *Harris* and noted, "The other federal circuits have expressly refused or have failed to follow the cited 1961 decision rendered by a divided panel in *Harris* v. *Standard Accident Co.*, . . . Further it has been pointed out that the authorities upon which *Harris* relies are at least partially inapplicable, overruled or otherwise nonpersuasive . . ." (182 So. 2d 149, 150).

Harris has been criticized in a number of law review notes. See for example, 60 Mich. L. Rev. 517 and 41 Texas L. Rev. 595.

The Oregon Supreme Court has not directly passed upon the issue of damages presented here. However, we know from reading the decision in *Kuzmanich* v. *United Fire & Casualty Co.*, 242 Or. 529, 410 P.2d 812 (1966) that it was an action by an administrator of a deceased insured's estate to recover "for the unpaid balance of $15,000.00 plus attorney's fees, claiming defendant was negligent and did not exercise good faith in failing to settle Marin's claim within policy limits." The court assumed, without deciding, that the administrator could bring the action without first paying, or being able to pay, the excess judgment.

Also, we know from reading both *Kuzmanich* and *Radcliffe* v. *Franklin National Insurance Co.*, 208 Or. 1, 298 P.2d 1002 (1956) that the Oregon court will scrutinize the conduct of an insurer in an excess judgment case and will insist that the insurer give the insured's interest at least equal consideration with its own and that the insurer is a fiduciary or trustee or agent of the insured.

There is nothing in the Oregon decisions to indicate that the Oregon Supreme Court would favor or give a windfall to an insurer who happened to have an insolvent for an insured. Nor is there anything to indicate that the Oregon court would offer any inducement to an insurer not to abide by its duty

as a fiduciary because it had an insolvent insurer.

Also, in Oregon (as elsewhere) the administrator is bound by a fiduciary duty to collect all that is owing to the insured's estate (ORS 116.130; see also *Lee* v. *Nationwide Mutual Insurance Company*, 286 F.2d 295, 296 (4 Cir., 1961).

CREDIBILITY OF WITNESSES

The appellant purportedly assigns as error the proposition that interest, bias and inconsistency of a witness must be considered in evaluating his testimony (App. Brief, p. 3). If this is a valid specification of error then appellee has no quarrel with it.

As is obvious in the trial below the Federal trial judge did consider the interest, bias and inconsistencies, if any, of the witnesses. See the Judge's comments thereon at the conclusion of the trial (Tr. 321). After hearing the cross-examination of Mr. Samuels, the insurer's trial counsel in the State court, it is amazing the trial judge did not rebuke him but instead let him down very gently (Tr. 272 et seq; Tr. 321).

Appellant is in error in its brief (p. 16) in stating that at the trial Mr. Ryan was inconsistent between deposition and trial in indicating that offers of settlement were made during an automobile ride. In fact, he testified to one such telephone offer on April 16, 1964 and to another offer, the next day, in an automobile ride with Mr. Samuels back from the

courthouse after they first argued the motions for new trial (Tr. 23-25).

ATTORNEY'S FEE ALLOWABLE

As noted earlier, under the Statement of Facts, counsel for the insurer, after both sides rested below, conceded that if the plaintiff were to prevail he, the plaintiff, would be entitled to an attorney's fee under the statute (Tr. 315). The insurer now contends that it was improper to allow any attorney's fees to plaintiff below because this was a tort action. As we will presently show, whether the action was in contact or tort has no bearing on the allowance of an attorney's fee under ORS 736.325. The Oregon Legislature never so limited recovery.

The essential parts of ORS 736.325 reads as follows:

> "Recovery of attorney fees in action on policy. (1) If settlement is not made within six months from the date proof of loss is filed with an insurance company . . . and a suit or action is brought in any court of this state upon any policy of insurance of any kind or nature . . . and the plaintiff's recovery exceeds the amount of any tender made by the defendant in such suit or action, then the plaintiff, in addition to the amount that he may recover, shall be allowed and shall recover as part of his judgment such sum as the court may adjudge to be reasonable as attorney's fees."

This Court will note that the Legislature did not

say "a suit or action ex contractu" or a "suit or action ex delicto." It said "a suit or action" without qualification as to its kind or nature.

The gravamen of the course of action herein was that the insurer violated the contractual terms of its policy giving its sole control to settle in that it negligently and in bad faith failed to settle within policy limits. Obviously it was an action upon the policy within the meaning of the statute. If there had been no policy there would have been no action.

Courts which have had occasion to consider, for one reason or another, whether an action on an excess judgment is in contract or in tort have arrived at differing answers and analyses. Some of these courts indicate that the insurer's duty arises from an implied covenant in the policy to act reasonably and in good faith in effecting settlements within the policy limits.

Recently the California Supreme Court in the *Crisci* excess judgment case indicated that the action was in both contract and tort and not exclusively in either category (426 P.2d 173). For cases emphasizing covenant aspects see *Gray* v. *Nationwide Mutual Ins. Co.*, 422 Pa. 500, 233 A.2d 10 (1966); *American Fire and Casualty Company* v. *Davis*, — Fla. —, 146 So. 2d 615 (1962); *In re Layton*, 221 F. Supp. 667 (D.C. Ariz., 1963); *American Fidelity & Casualty Co.* v. *Greyhound Corp.*, 258 F.2d 709 (5 Cir., 1958).

In any event it is not necessary for this Court to

"pigeon-hole" this case because so far as the attorney's fee statute is concerned the prevailing plaintiff in any kind of an action upon the policy is entitled to attorney's fees where there has been no settlement within six months from proof of loss or commencement of the action.

In a case where the policy does not require filing of a proof of loss, as is true here, commencement of the action is equivalent to demand for payment and renders ORS 736.325 applicable. (*State* v. *Claypool*, 28 P.2d 882; *Journal Pub. Co.* v. *General Cas. Co.*, 210 F.2d 202 (9 Cir., 1954).

As noted earlier, there are only two Oregon excess judgment cases namely *Radcliffe* and *Kuzmanich*. In neither case was the matter of attorney's fees in issue. However, in *Kuzmanich* the court noted that the action was to recover "for the unpaid balance of $15,000 plus attorneys' fees, claiming defendant was negligent and did not exercise good faith in failing to settle Marin's claim within policy limits." The Court thus assumed, without deciding, that attorney's fees were recoverable in an excess judgment action.

There are, however, numerous decisions by both state and federal courts which have liberally interpreted ORS 736.325 so as to allow attorney's fees to prevailing plaintiffs in a great variety of actions against insurers. (SeeP. & A. (24), *supra*).

For direct decisions on attorney's fee in an excess judgment case we must go outside Oregon.

In *American Fidelity & Casualty Co.* v. *Greyhound*, 258 F.2d 709 (5 Cir., 1958) the circuit court faced the problem of whether the insured in an excess judgment case could recover attorney's fees under a Florida statute. There were no Florida decisions directly in point. The Florida statute provided for an attorney's fee "Upon the rendition of a judgment or decree by any courts of this state against any insurer in favor of any beneficiary under any policy or contract of insurance . . ." The circuit court held that the prevailing insured was entitled to attorney's fee and noted that, "The provision of the Florida statute is a procedural one and the attorney's fees for which it provides are in the nature of a penalty, imposed under the police power of the State, incurred in the conduct of a business affected with a public interest . . ." (258 F.2d at 717).

The appellant in the case at bar has cited *Zumwalt* v. *Utilities Ins. Co.*, 228 S.W.2d 750 for the proposition that attorney's fees should not be allowed. In the *Greyhound* case the Fifth Circuit cited the *Zumwalt* case for another proposition but ignored it on the subject of attorney's fees (258 F.2d 712, 717, 718).

Some four years after *Greyhound*, a Florida State Appeal court squarely faced the question of attorney's fees in the excess judgment case of *American Fire and Casualty Co.* v. *Davis*, 146 So. 2d 615 (1962). There the insurer contended as does State Farm here that an excess judgment case is a tort action and that the statute allowing attorney's fees

did not apply to a tort action. The Florida court denied the insurer's contention, held the statute applicable and upheld the award of attorney's fees.

The *Zumwalt* case relied upon by appellant was a Missouri decision decided in 1950 under the wording of a Missouri statute. The wording of the Missouri statute is much more restrictive than the wording of either the Oregon or Florida statutes. The pertinent parts of the Missouri statute provide: "In any action against any insurance company to recover the amount *of any loss* under a policy . . . if it appear from the evidence that such company has vexatiously refused to pay *such loss*, the court or jury may . . . allow the plaintiff damages not to exceed ten per cent of the amount of the loss and a reasonable attorney's fee; . . ." (emphasis added). The Missouri Court held that the excess judgment action was a tort action and "is not an action to recover "any loss under a policy of insurance." The Court also held that no action on a contract will lie in an excess judgment situation. While the *Zumwalt* case is easily distinguishable, its reasoning is not sound and does not appear to have impressed courts in other jurisdictions on attorney's fees or theories of action.

AMOUNT OF ATTORNEY'S FEE

Counsel for the appellee undertook this excess judgment case under a contingent fee arrangement. The Oregon State Bar previously had promulgated

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AMOUNT OF ATTORNEY'S FEE

Counsel for the appellee undertook this excess judgment case under a contingent fee arrangement. The Oregon State Bar previously had promulgated

a Minimum Bar Fee Schedule, binding on all Oregon lawyers, and which provided for a minimum fee of 40% of the client's recovery, upon trial, under such a contingent fee arrangement (Tr. 40, 41).

At the conclusion of the case, the Federal trial judge, who was a visiting Judge from Nevada, repudiated the contingent fee arrangement although his attention was called to the fact, orally and in a written trial memo, that the Oregon Supreme Court had already approved of a contingent fee in an action against the insurer and where attorney's fees were sought under ORS 736.325 (Tr. 317, 318, 319; R. 68). See *Denley* v. *Oregon Auto Ins. Co.*, 47 P.2d 946 (1935).

Contingent fee contracts are widely used by ethical, reputable lawyers in Oregon.

In an excess judgment case such an arrangement is especially important for a number of reasons.

In the first place, it is obvious that the Legislature in enacting the attorney's fee statute in insurance disputes did so to police the insurance industry and to encourage plaintiffs who felt aggrieved to be able to procure competent counsel to go into battle for them. This legislative aim will be emasculated if Courts only allow meager fees as litigation with insurers is usually difficult and protracted and not always successful. Fair compensation for the plaintiff's counsel has to take into consideration the dry holes as well as those where oil is struck for the client.

In the second place, aggrieved plaintiffs in insurance disputes, especially those with serious personal injuries, are often without funds to pay a competent lawyer on a per diem or hourly basis.

The Oregon State Bar is an integrated Bar and as such is a public corporation. ORS 9.010 provides in pertinent parts as follows:

> "Status of attorney and Oregon State Bar. An attorney, admitted to practice in this state, is an officer of the court; and the Oregon State Bar is a public corporation . . ."

As such public corporation, the Bar enacted minimum fees which Oregon attorneys are required to follow. How then is it right or sensible for a federal court to repudiate the Oregon Supreme Court, the Oregon State Bar and the Oregon Legislature? We believe the Federal trial judge did so without full realization of the consequences.

There is a disputable presumption in Oregon that "Official duty has been regularly performed" (ORS 41.360 (15). The minimum contingent fee prescribed by the State Bar in performing its official duty is 40% of $31,979.38 or $12,791.75. The insurer has not overcome this disputable presumption that such a fee is a regular and reasonable one herein.

Accordingly we ask that the appellee's attorney fee be increased from $4,000.00 to $12,791.75 and that upon affirmance or enlargement of the judgment by this Court that additional attorney's fees be allowed for attorney services on this appeal. See

Michigan Millers Mutual Fire Ins. Co. v. *Grange Oil Co.*, 175 F.2d 544 (9 Cir., 1949); *Horwitz* v. *New York Life Ins. Co.*, 80 F.2d 295 (9 Cir., 1935).

Respectfully submitted,

JAMES J. KENNEDY
RYAN & RYAN
Attorneys for Appellee and
Cross-Appellant.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

JAMES J. KENNEDY
Attorney.

NO. 21671

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ACIFIC GRAINS, INC.,

Appellant,

v.

OMMISSIONER OF INTERNAL
EVENUE,

Appellee.

APPELLANT'S BRIEF

UTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON
lliam H. Kinsey
ephen B. Hill
12th Floor Standard Plaza
Portland, Oregon 97204

torneys for Appellant

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No. 21671

IN THE UNITED STATES COURT OF APPEALS

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ACIFIC GRAINS, INC.,

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OMMISSIONER OF INTERNAL
EVENUE,

Appellee.

APPELLANT'S BRIEF

Appeal from the Tax Court of the United States

STATEMENT OF JURISDICTION

This is an appeal from the decision of the Tax Court of he United States affirming the determination of the Commissioner f Internal Revenue which asserts for the fiscal years ending anuary 31, 1963 and January 31, 1964, Federal income tax eficiencies against Appellant in the respective amounts of 5,850 and $12,408.06. If Appellant was entitled to deduct as business expense all compensation paid to Mr. Robert R. Rodgers, ppellant's president, in excess of $30,000, the amount determined o be unreasonable by the Tax Court, there is no deficiency for he years here involved. Appellate jurisdiction and venue are ranted this Court by 26 U.S.C.A., Sec. 7482(a) and 7482(b)(1).

he Tax Court had the jurisdiction by virtue of 26 U.S.C.A. c. 7442.

STATEMENT OF THE CASE

Pacific Grains, Inc., an Oregon corporation formed on bruary 19, 1955, has its principal office in Rickreall, egon. Pacific Grains, Inc. (hereinafter referred to as etitioner") filed Federal income tax returns for the fiscal ars ending January 31, 1963 and January 31, 1964, the years re involved, with the District Director of Internal Revenue r the District of Oregon.

Petitioner is entitled to a business deduction of the mpensation paid to Robert R. Rodgers, provided such mpensation was a reasonable allowance as set forth in Section 2 (a)(1). The Tax Court held that the compensation paid in cess of $30,000 was not reasonable.

There is no controversy concerning the facts set forth low. They are either direct, or substantially direct, otations from the stipulation and Tax Court findings, or are sed upon uncontradicted testimony. The transcript of the cord consists of two volumes. Volume I containing the ipulation of the parties, the exhibits, all of which were int exhibits of the parties under the stipulation, and the x Court memorandum findings of fact and opinion is hereinafter ferred to as "R". Volume II containing the report of the oceedings before the Tax Court is hereinafter referred to "Tr".

Mr. Rodgers is president and principal officer of

titioner and the owner of all the presently outstanding ock in Petitioner. (R 16, Stip. para. 5). The full attention Mr. Rodgers is directed toward Appellant (Tr 18).

Mr. Rodgers came to Oregon in 1946 at the age of 26 years ortly after being separated from the Armed Forces following rld War II. He began work at Derry Warehouse Co., a grain evator company, near Rickreall, Oregon, and by 1952 had come manager thereof. He served as manager of the company ring 1952, 1953, and 1954, but at no time did he own stock this company. (R 19, Stip. para. 13).

Along with his long time friend, Wayne R. Giesy, he ft Derry Warehouse Co. and with Mr. Giesy formed Petitioner February, 1955, "with its principal assets being a grain evator in Rickreall, Oregon, which had a capacity of proximately 300,000 bushels". Later in the same year, titioner built another elevator at Suver, Oregon, with a pacity of 50,000 bushels. Petitioner "commenced operations terally 'across the street' from Derry Warehouse and directly mpeted with Derry Warehouse." (R 19, Stip. para. 13).

Upon formation of Petitioner, Mr. Rodgers became esident and treasurer of the corporation and Mr. Giesy came vice president. In February of 1959, Mr. Giesy sold s stock to Mr. Rodgers, and Mr. Rodgers took over the duties eviously performed by Mr. Giesy in addition to his own. (R , Stip. para. 7).

Petitioner was started with Mr. Rodgers and Mr. Giesy rrowing approximately $30,000 in cash, and with this money

hey purchased the stock of Petitioner (Tr 15-6). From this eginning, Petitioner has grown to the point that the net orth of the corporation was $119,090.26 for the fiscal year nding January 31, 1963 and $140,784.91 for the fiscal year nding January 31, 1964 (R 74). These net worth figures differ omewhat from the net worth figures shown on the tax returns or these years by reason of the non-reflection on the books f the company of the special tax deduction for emergency mortization of grain facilities (Tr 29).

During the years here involved Petitioner had an overall nvestment in grain storage facilities of approximately 260,000 in 1963 and $340,000 in 1964 (R 17, Stip. para. 6) nd an overall investment in grains and grass seeds of $207,331 n January 31, 1963 (R 33) and $403,367 on January 31, 1964 R 43).

In the initial stage of formation, Petitioner was engaged n the operation of grain elevators and a warehouse. The peration of the warehouse was to buy grain and seed from the armers, process the same by cleaning and bagging and then elling the end product. (Tr 16).

Due to the instigation of the soil bank and diversified eed grain programs of 1961 by the Federal government, ubstantial amounts of acreage were removed from production nd thereby storage income from the elevators was reduced. To ffset this reduction Petitioner entered into the trading of rass seed on a world-wide basis. (R 18, Stip. para. 8) By eason of this trading on a world-wide basis the corporate

ales increased significantly despite the decrease in acreage roduction in the local area (R 18 Stip. para. 9), and the axable income was increased to a new corporate high in each f the subsequent years (R 72).

For the fiscal years here involved the sales from trading epresented approximately 85% of the gross income with the emaining 15% being earned from grain storage and cleaning perations (R 17, Stip. para. 6). Almost all the income for he years here involved was attributable to the trading perations (Tr 17-8, 39).

Trading is a highly competitive and speculative operation nd its success is almost entirely dependent upon the abilities f the trader (Tr 18-20). One serious error of judgment in the uying and selling on the fast fluctuating market could leave he trader's firm in a very precarious position (R 18, Stip. ara. 8). The mortality among businesses in such operations is igh. Mr. Rodgers testified that there was in the past years three or four in the West Willamette Valley that had gone out f business and several of them by the bankruptcy route". (Tr 19)

Mr. Rodgers does all the trading for Petitioner (Tr 18). n this position, constant devotion to and study of weather and rop conditions throughout the world is required (R 18, Stip. ara. 8). Due to the varying time differentials around the orld, Mr. Rodgers has received telephone calls dealing with he business of Petitioner at all hours of the day and night R 18, Stip. para. 10), and usually must devote about twelve ours a day to the operations of the Petitioner (Tr 18). Other

than a possible business convention, Mr. Rodgers has not taken a vacation in the last eight years (Tr 25).

Mr. Rodgers is highly thought of by others in the trading business and has a reputation of being highly competent. Mr. Dave Lees, an employee of a competitor of Petitioner, testified that Mr. Rodgers was "real competent and is a good trader and his contracts are good. His integrity is above reproach and he does a lot of business". (Tr 41) Mr. William K. Wiley, another competitor, testified that Mr. Rodgers' reputation is excellent", and he is "well thought of" and "very competent" (Tr 54).

In addition to doing all the trading, Mr. Rodgers was also ultimately responsible for the other operations of Petitioner, including the grain elevators. The Petitioner has "roughly half a dozen" permanent employees and during the summer months an additional forty to fifty employees are hired to help in the operation of the grain elevators (Tr 20).

For the fiscal year ended January 31, 1963, Mr. Rodgers was paid a compensation of $41,250 and for the fiscal year ended January 31, 1964, a compensation of $55,200 (R 17, Stip. para. 5). For the same period Petitioner paid its other two principal employees an aggregate of $18,785.20 for the fiscal year ended January 31, 1963, and $27,281.20 for the fiscal year ended January 31, 1964. (R 19, Stip. para. 11). Part of the compensation paid to Mr. Rodgers and Petitioner's other principal employees was in the form of a bonus paid at the end of each of the years, a practice which Petitioner had followed in prior

ears. (R 17, 19, Stip. para. 5, 11).

For the nine years from Petitioner's formation through
ne years here involved, the compensation paid to its officers
nd its taxable income are as follows (R 72):

al Year	Compensation Paid to Mr. Giesy	Compensation Paid to Mr. Rodgers	Total Compensation Paid to Officers	Taxable Income
31, 1956	$ 2,100.00	$ 2,100.00	$ 4,200.00	$ 2,452.67
31, 1957	5,400.00	6,300.00	11,700.00	13,116.65
31, 1958	13,600.00	17,200.00	30,800.00	13,045.01
31, 1959	6,600.00	10,700.00	17,300.00	(14,104.72)
31, 1960	_____	22,000.00	22,000.00	4,713.14
31, 1961	_____	22,000.00	22,000.00	(16,338.48)
31, 1962	_____	29,000.00	29,000.00	24,681.67
31, 1963	_____	41,250.00	41,250.00	26,362.78
31, 1964	_____	55,200.00	55,200.00	34,630.25

he average annual compensation received by Mr. Rodgers from
titioner for the above nine-year period was approximately
2,860.

The average annual compensation received by Mr. Rodgers
or the three years he was employed as manager of Derry Warehouse
., a corporation in which he owned no stock, was significantly
n excess of the average annual compensation he received from
titioner for the above nine-year period. Mr. Rodgers received
r his duties as manager an average annual compensation of
6,050 per year from Derry Warehouse Co. (Tr 28). His duties
manager required of him only a forty-hour work week and no par-
cipation in trading operations (Tr 23).

In the early years of Petitioner, Mr. Rodgers testified that
paid himself less than he was worth so that the earnings would
left in the corporation thereby enabling Petitioner to grow
r 21). Mr. Giesy also testified that they did not intend the

ompensation to represent the value of their services because hey wanted to build up the business (Tr 57).

Mr. Dave Lees testified that his compensation was omparable to the compensation received by Mr. Rodgers from etitioner for the fiscal years ending January 31, 1963 and anuary 31, 1964 (Tr 46-7). The corporation for which Mr. Lees orks is in competition with Petitioner, and Mr. Lees serves s its president. The corporation is engaged in the trading f grain, seed and commodities with Mr. Lees making all of the rading decisions (Tr 40-1, 45, 48). Mr. Lees testified that the perations of his corporation were comparable to those of etitioner with the exception that his corporation operated o grain elevators (Tr 41).

Mr. Lees further testified that the compensation paid to r. Rodgers in view of the Petitioner's net profits was not nusual (Tr 46), and that "I know of competitors whose compen- ation is about the same as Mr. Rodgers'" (Tr 45). He also xplained that in the trading business if a man does a good job nd he asks for more money and the firm is making more money, e is given more money (Tr 45).

Mr. William Wiley, whose business is comparable in the ajor respects to the trading operations of Petitioner, also estified that his compensation was comparable to the compen- ation received by Mr. Rodgers for the fiscal year here involved (Tr 54).

Mr. Rodgers testified that he did not believe he was verpaid by the compensation he received for services rendered

n the fiscal years ending January 31, 1963 and January 31, 964 (Tr 21-2).

The testimony of Mr. Rodgers is corroborated by the vidence of the annual rate of return on the invested capital f petitioner. The annual rate of return on the invested apital (capital plus retained earnings) of petitioner after the eduction of Mr. Rodgers' compensation and Federal income taxes re as follows for the first nine years of petitioner's erations, the average return being 18.92 per cent (R 74):

Fiscal Year Ended	Percentages of Return
1/31/56	15.18%
1/31/57	14.10%
1/31/58	43.94%
1/31/59	13.09%
1/31/60	30.27%
1/31/61	2.35%
1/31/62	20.42%
1/31/63	15.57%
1/31/64	15.41%

Mr. Harold Brevig, the certified public accountant for titioner, testified that he did accounting work for other local mpanies that could be considered comparable to Petitioner and at he determined by computation that not one of these other ients had a higher rate of return on invested capital (Tr 34). . Brevig explained that the local companies to which he referred re primarily in the trading business like the Petitioner and at trading was at least as large a part of their business as was of the Petitioner's business (Tr 35).

The average annual return among the five hundred largest rporations in the United States was 10.5% for 1964 and 9.1% for 63 (Tr 31-2). The average annual return over a nine-year

eriod for eight large corporations which were somewhat comparable
o Petitioner were 4.3%, 7.15%, 13.27% 10.85%, 8.93%, 5.60%,
2.62%, and 10.0% (Tr 33-4)

SPECIFICATIONS OF ERROR

Petitioner contends the Tax Court of the United States erred as follows:

1. In not recognizing the economic realities which negate the adverse inferences drawn by the Court.
2. In considering only the compensation paid during the years at issue without taking into account the full picture.
3. In holding it was not bound by the uncontradicted and unimpeached testimony of Mr. Lees and Mr. Wiley.
4. In refusing to admit into evidence the testimony of Mr. Lees concerning his opinion of the reasonableness of the compensation paid by Pacific Grain, Inc. to Mr. Rodgers.
5. In failing to recognize and to be bound by the testimony of Mr. Rodgers that the compensation paid to him by Pacific Grains, Inc. for the fiscal years ending January 31, 1963 and January 31, 1964 was reasonable.
6. In holding that the evidence concerning the rate of return on the invested capital of Pacific Grains, Inc. for the fiscal years ending January 31, 1963 and January 31, 1964 was of scant value.
7. In holding that Pacific Grains, Inc. had failed to meet its burden of proof and that the determination of the Commissioner must be sustained.

SUMMARY OF ARGUMENT

As confirmed by the Commissioner in his Regulations, determination of reasonableness of compensation paid for a particular year should take into account all the compensation paid to the employee, including compensation for prior years. If total, aggregate compensation paid to the employee through the last year at issue is reasonable for all services rendered by the employee to the end of such year, no portion of the compensation is unreasonable.

Mr. Rodgers' employment as President of Petitioner covers a span of nine years commencing with the formation of Petitioner in February, 1955, continuing through the last year here involved (January 31, 1964). The aggregate compensation paid Mr. Rodgers over such nine year period averaged $22,860.00 per year.

In the usual reasonable compensation case, there is no prior employment record of the subject individual to throw light upon the value of his services. Then, for want of something better, compensation paid others in comparable positions must be utilized as the primary basis of determination. The instant case is unique in this respect.

efore forming Petitioner in February, 1955, Mr. Rodgers as manager of Derry Warehouse Co., a grain elevator company ear Rickreall, Oregon. It is stipulated that Petitioner, ith Mr. Rodgers as President, " . . . commenced operations iterally 'across the street' from Derry Warehouse and dir-ctly competed with Derry Warehouse".

When a person follows the aggressive American radition of quitting his job to open a competing business cross the street, the compensation received by such ndividual from his prior employer should have a significant earing upon the worth of his services to the new business, articularly where (as here) the competition is successful to uch an extent that the business realizes a remarkable 15% fter-tax return on invested capital despite payment of the ompensation alleged to be excessive. A person capable of uch accomplishments should be worth compensation equal to hat he would have received from his former employer if he had ontinued for a similar period of time at the average rate of ompensation paid by the former employer. During the three ears Mr. Rodgers worked as manager of Derry Warehouse Co., is compensation averaged $26,050.00 per year. This is sub-tantially more than the $22,860.00 per year average of the ompensation paid Mr. Rodgers by Petitioner through the last ear at issue.

The Tax Court ignores the conclusive impact of the oregoing and focuses attention on the fact that the $41,250.00 nd $55,200.00 paid by Petitioner to Mr. Rodgers as compensation or the fiscal years ending January 31, 1963 and January 31,

anuary 31, 1962. Unable to find satisfactory evidence that uch "dramatic jumps" were justified by increased duties and esponsibilities on the part of Mr. Rodgers during the fiscal ears ended January 31, 1963 and 1964 over the duties and res- onsibilities during the fiscal year ended January 31, 1962, he Tax Court concludes that the increases were intended as istributions of earnings rather than compensation for services endered.

The "dramatic jumps" in Mr. Rodgers' compensation are ttributable to economic motivation furnished by the corporate ax structure whereunder Congress, in recognition of the finan- ial difficulties faced by small corporations, taxes the first 25,000.00 of corporate taxable income at a substantially lower ate than taxable income over $25,000.00. While a corporation s under the $25,000.00 taxable income level, compensation for- bearance by the controlling stockholder results in corporate etention of 70¢ after taxes per each dollar not paid as com- ensation. Mr. Rodgers acquiesced in receipt of less than easonable compensation during the years that his forbearance generated 70¢ after-tax dollars to Petitioner. The situation hanged when taxable income of Petitioner reached $25,000.00, as it did for the years at issue. Then, compensation forbear- ance would have left the corporation with only 48¢ after taxes per dollar not paid as compensation.

Nothing in the tax law requires that a corporation pay reasonable compensation to its controlling officer- stockholder. It is perfectly legitimate to pay less than reasonable compensation when the savings resulting therefrom

ncrease corporate surplus by 70¢ after taxes per each etained dollar. Such underpayment does not preclude the aking up for past underpayments when taxable income exceeds 25,000.00 leaving the corporation with only 48¢ after taxes er each dollar not paid in compensation. This is precisely hat Congress encouraged by creating a difference in tax ates on corporate taxable income under $25,000.00 and tax- ble income over $25,000.00.

The important thing is not the erratic compensation attern motivated by tax considerations, but the question is hether the total, aggregate compensation paid over the full pan of years through the last year at issue is reasonable for he total services performed during such years. As set forth bove, the aggregate compensation paid Mr. Rodgers by Petitioner rom the time of its formation in February, 1955 through anuary 31, 1964, was less than the amount Mr. Rodgers would ave received during the same period of years if he continued ith Derry Warehouse Co., earning compensation at the same verage rate received during the three years he was manager of erry Warehouse Co.

By emphasizing the foregoing unique feature of this ase, Petitioner does not concede that the compensation paid r. Rodgers for the fiscal years ended January 31, 1963, and anuary 31, 1964, was unreasonable if judged on the basis of hose years alone. Substantial evidence presented by etitioner sustains the reasonableness of such compensation ithout taking into account the under payments in prior years.

Mr. Lees and Mr. Wiley, who occupy comparable
ositions in the trading business, each testified that his
ompensation was comparable to the compensation received by
r. Rodgers for the years here involved. Mr. Lees further
estified that Mr. Rodgers' compensation in relation to the
et profits of Petitioner was not unusual and that he knew of
ther men in comparable positions in the trading business
hose compensation was also about the same as that of Mr.
odgers. Since this testimony was uncontradicted and
nimpeached, the Tax Court was required by the rule of this
ourt to follow such testimony with its strong inference of
he reasonableness of the compensation paid to Mr. Rodgers.

Mr. Rodgers, himself, testified that the compensa-
ion paid to him for the years here involved was reasonable.
he Commissioner did not attempt to impeach this testimony
r present any testimony or other evidence to the contrary.
his evidence the Tax Court was also required to consider and
ollow under the rule of this Court.

Petitioner established by stipulated facts that for
he years here involved, it had a return on invested capital
capital plus retained earnings) of over 15% after payment of
r. Rodgers' compensation and Federal income taxes. Such a
eturn, according to the Petitioner's certified public
ccountant, was as great as any of his other clients which
ere comparable to the Petitioner and was far greater than
he average return earned by the 500 largest corporations in
he United States. This evidence being uncontradicted and
nimpeached, the Tax Court could not arbitrarily ignore such
vidence which showed an after-tax return of over 15% on

nvested capital as a most satisfactory return. Since income an only be earned through the use of capital or labor and ince the invested capital of petitioner was being most satisactorily compensated for its use, the Tax Court should have ecognized that Mr. Rodgers was not being paid more than a easonable compensation for his services during the years here nvolved.

Despite the foregoing evidence and evidence of the ubstantial skill, hard work and heavy responsibility required f Mr. Rodgers in his duties for Petitioner, the Tax Court held hat the Petitioner had not overcome its burden of proof. bviously, the Petitioner's evidence was such that the ommissioner's determination could have been found inaccurate, nd so the presumption of correctness in favor of the ommissioner's determination disappeared. With the disappearnce of the presumption, the Tax Court was required to render ts decision only on the basis of the evidence presented.

Aside from the evidence of the Petitioner, the Tax ourt could only look to certain stipulated facts which the ommissioner asserted gave the impression that part of the ompensation for the years here involved looked like disguised ividends. However, when these facts are viewed within the ontext of this case, the inference does not readily follow rom these stipulated facts, and a far more logical explantion appears which in no way indicates either disguised ividends or unreasonable compensation. Having no evidence,

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FIRST SPECIFICATION OF ERROR

The Tax Court erred in not recognizing the economic realities which negate the adverse inferences drawn by the Court.

ARGUMENT

The primary fact relied on by the Tax Court is that the $41,250 and $55,200 paid by Petitioner to Mr. Rodgers as compensation for the fiscal years ended January 31, 1963 and January 31, 1964, respectively, substantially exceeded the $29,000 in compensation paid to Mr. Rodgers for the fiscal year ended January 31, 1962. Unable to find satisfactory evidence that such "dramatic jumps" were justified by increased duties and responsibilities on the part of Mr. Rodgers during the fiscal years ended January 31, 1963 and 1964 over the duties and responsibilities during the fiscal year ended January 31, 1962,[1] the Tax Court concludes that the increases were intended as distributions of earnings rather than compensation for services rendered.

While the Tax Court uses the $29,000 paid for the fiscal year ended January 31, 1962 as a basis for the determination that "jumps" in the two subsequent years were intended as

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1 The Tax Court so found despite the fact that the dollar volume of sales for the fiscal year ended January 31, 1964 had increased by 34 per cent over the dollar volume of sales for the fiscal year ended January 31, 1962 (R 18, Stip. para 9). Most of such increase coming from the trading by Mr. Rodgers in grass seed on a world-wide basis (R 18, Stip. para. 8).

istributions of earnings, the Tax Court fails to point out that he $29,000 constituted a $7,000 jump over the $22,000 paid uring each of the prior fiscal years ended January 31, 1960 nd 1961. The same economic factors which motivated the 7,000 jump to $29,000 also motivated the subsequent jumps o $41,250 and $55,200. The fiscal year ended January 31, 1962 as the first year of Petitioner's existence when the taxable orporate income would have exceeded $25,000 at the then revailing rate of Rodgers' compensation. Whether corporate axable income is less than $25,000 or more than $25,000 has ignificance. Under the corporate tax structure in existence or many years, corporate taxable income under $25,000 has been axed at a lesser rate than taxable income over $25,000. For he years here involved, corporate taxable income under $25,000 as taxed at 30% and corporate taxable income in excess of $25,000 as subject to an additional surtax of 22%, making a total tax f 52% on corporate taxable income over $25,000. The Revenue ct of 1964[2] applicable to taxable years beginning after ecember 31, 1963 reduced corporate taxes, and the explanatory ommittee reports contain the following significant statement:

> "The 'reversal' of the corporate rates should be a substantial benefit to small business. The substitution of a 22-percent rate for the 30-percent rate represents a rate reduction of nearly 27 percent on the first $25,000 of income, as contrasted to the rate reduction for above $25,000 of slightly less than 8 percent...

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2 78 Stat. 19 (1964)

> "Your committee believes that it is important to provide a greater rate reduction for small businesses because of their importance in maintaining competitive prices in our economy, and also because of the greater difficulty small businesses have in finding outside funds to finance their expansion. As a result they have traditionally found it necessary to expand largely out of income remaining after tax."[3]

his makes it clear that the lower corporate tax on the first 25,000 of taxable income is intended as an encouragement to mall business for the purpose of enabling them to accumulate fter-tax income, a thing to be fostered because small usinesses are important in maintaining competitive prices in ur economy.

While the difference in tax rates applicable to income nder $25,000 and income over $25,000 is greater under the evenue Act of 1964 than under the Act applicable to the years ere at issue, there was nonetheless a 22% difference between he tax rates applicable to Petitioner's taxable income under 25,000 and taxable income over $25,000. Such a tax structure urnishes strong motivation for a small corporation to do hatever it can to build up the first $25,000 of net annual ncome. An obvious way to control taxable corporate income s through the amount of compensation paid controlling stock-olders. Forbearance of a controlling stockholder in taking ompensation when the corporation is under the $25,000 income evel will leave the corporation with 70¢ out of each dollar

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3 H. R. Rep. No. 749, 88th. Cong., 1st Sess. 27 (1963); . Rep. No. 830, 88th. Cong., 2d Sess. (1964).

ıot paid as compensation. When corporate taxable income
:xceeds the $25,000 level, each dollar of compensation
'orbearance leaves the corporation with only 48¢ after taxes.
:t is much easier to forbear taking deserved compensation
'hen the reward to the corporation is 70¢ after-tax dollars
han when the reward is only 48¢ after-tax dollars.

As stated by this Court in the recent case of Murphy
ogging Co. v. United States, (9th Cir. May 15, 1967) 67-1
.S.T.C. Par. 9461:

> "...Tax reduction is not evil if you do not do it evilly. Often an inefficient operator, wise as to taxes, can do better than an efficient operator who is stupid about his taxes."

n Commissioner v. Brown, 380 U.S. 563, 579-80 (1965) affirming
decision of this Court, Justice Harlan's concurring opinion
elates:

> "...the tax laws exist as an economic reality in the business man's world, much like the existence of a competitor. Businessmen plan their affairs around both and a tax dollars is just as real as one derived from any other source."

etitioner and Mr. Rodgers would have been stupid and oblivious
o economic reality if they had not responded to the Congressional
ncouragement afforded small corporations in building up after-
ax dollars at the preferential rate applicable to corporate
axable income under $25,000.

It is no mere coincidence that the $7,000 compensation
ncrease given Mr. Rodgers for the fiscal year ended January

1, 1962 reduced Petitioner's taxable income to $24,681.67 hich is about as close to $25,000 as one can come since onuses are declared just prior to the end of the fiscal year n the basis of tentative figures. The Commissioner has never omplained about the amount of compensation paid to Mr. Rodgers or the fiscal year ended January 31, 1962. The same motivation nfluenced the amount of compensation paid to Mr. Rodgers in ubsequent years. The $41,250 for the fiscal year ended January 1, 1963 reduced Petitioner's taxable income to $26,362.78 and he $55,200 paid to Mr. Rodgers for the fiscal year ended anuary 31, 1964 reduced Petitioner's taxable income to $34,630.25.

Nothing in the tax law requires that a corporation pay easonable compensation to its controlling officer-stockholders. t is perfectly legitimate to pay less than reasonable ompensation when the savings resulting therefrom increases orporate surplus by 70¢ after taxes per each retained dollar. his does not preclude the payment of reasonable compensation, r even the making up for past underpayments[4], in subsequent ears when corporate taxable income exceeds $25,000 and ompensation forbearance would leave the corporation with only 8¢ after-tax dollars. As indicated by the above quotation rom the committee's reports, this is precisely what Congress ntended by creating a difference in tax rates on net income ver $25,000 and net income under $25,000. The stated reason

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[4] See Lucas v. Ox Fibre Brush Co., 281 U.S. 115, 119 1930)

hy Congress expended the benefit to small business was the ecognized importance of such business in "maintaining ompetitive prices in our economy". Petitioner certainly satis-ied this expectation through its competition with Derry Ware-ouse Co. and others, and through its trading activities.

It is quite ironic that the efforts of Petitioner to ake advantage of a Congressional concession to small businesses reated the situation which resulted in the assessment of an 18,258.06 deficiency. Such deficiency is approximately 17% f the retained earnings which Petitioner laboriously ccumulated from its formation in February 1955 through January 964. What cries of anguish would evolve if a large competitor f Petitioner were deprived of 17% of its retained earnings. omehow, the Commissioner and the Tax Court expect Petitioner o absorb this loss and still fulfill the Congressional desire f affording effective competition. Also ironic is the reason iven by the Tax Court for sustaining the deficiency - that the lisallowed compensation was intended as a distribution of arnings. It is perfectly ridiculous to say that Petitioner ntended to distribute earnings during the years ended January 31, 1963 and 1964 when the immediately preceding year was the irst time Petitioner reached the $25,000 level. In the above uotation from the committee reports, Congress recognized that mall corporations under the $25,000 per year level "...have

traditionally found it necessary to expend largely out of income remaining after taxes". Congressionally recognized necessity of small corporations to rely upon retained income after taxes for expansion militates against judicial inference that a small corporation, such as Petitioner, intendes a distribution of earnings. Upon reaching the $25,000 level, a small corporation may reward its president by paying reasonable compensation for current services, and even make up for past forbearances, because the corporation is spending 48¢ after-tax dollars rather than 70¢ after-tax dollars. It defies reality, however, to conclude solely from a jump in compensation made by a corporation when it begins spending 48¢ dollars that a distribution of earnings rather than compensation was intended.

While the above related economic realities explain Petitioner's erratic compensation pattern thereby negating the adverse inference drawn by the Tax Court, the following questions remain: (i) should the prior years when Petitioner underpaid Rodgers be considered in determining the reasonable-ness of Rodgers' compensation for the subject years, and (ii) did Petitioner over-respond to the new experience of spending 48¢ rather than 70¢ dollars?

SECOND SPECIFICATION OF ERROR

The Tax Court erred in considering only the compensation paid during the years at issue without taking into account the full picture.

ARGUMENT

When a person's employment covers a span of years, reasonableness of compensation for one or two years cannot be determined without taking into account the services rendered and the compensation paid for all of the years. This self-evident proposition is recognized by the Commissioner in the following extract from his Regulations:[5]

> "...What constitutes a reasonable allowance [for compensation for services rendered] depends upon the facts in the particular case. Among the elements to be considered in determining this are the personal services actually rendered in prior years as well as the current year and all compensation and contributions paid to or for such employee in prior years as well as in the current year. Thus, a contribution which is in the nature of additional compensation for services performed in prior years may be deductible even if the total of such contributions and other compensation for the current year would be in excess of reasonable compensation for services performed in the current year, provided that such total plus all compensation and contributions paid to or for such employee in prior years represents a reasonable allowance for all services rendered by the employee by the end of the current year." (Emphasis added)

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5 Treas. Reg. Sec. 1.404(a)-1(b). While the Regulation under Section 404 dealing with deduction of employer contributions to an employee's trust or annuity plan and compensation under deferred payment plans, the above quoted portion of the regulation applies to all compensation, not merely contributions under Section 404(a). In accord are the following cases which consider the reasonable compensation issue: Ernest Burwell, Inc. v. United States, 113 F. Supp. 26, 30 (W. D. S. Car. 1953); Jewel Ridge Coal Sales Co., Inc. 16 CCH Tax Ct. Mem. 140, 143 (1957).

Mr. Rodgers' period of employment as President and principal officer commenced with the formation of Petitioner in February 1955 and covers a period of nine years through the last fiscal year here involved. Set forth below is the compensation paid by Petitioner to Mr. Rodgers during these years:

Fiscal Year Ended January 31,	Total Compensation Including Bonuses
1956	$ 2,100.00
1957	6,300.00
1958	17,200.00
1959	10,700.00
1960	22,000.00
1961	22,000.00
1962	29,000.00
1963	41,250.00
1964	55,200.00

The above aggregate compensation averages $22,860 per year.

How does $22,860 per year compare with the earning power of Mr. Rodgers before coming with Petitioner? For the three years prior to forming Petitioner, Mr. Rodgers was manager of Derry Warehouse Co., a grain elevator company near Eckreall, Oregon in which he owned no stock (R 19, Stip. para. 8). During these years Derry Warehouse Co. paid Mr. Rodgers an average annual compensation of $26,050 (Tr 28). Such demonstrated ability to earn $26,050 in the competitive business world without benefit of control over the employer has significance even if there were no similarity between the two jobs. Petitioner could not have enticed Mr. Rodgers away from

erry Warehouse Co. in an arm's length transaction without ssuring him that low compensation in the company's formative ears would be made up in the future, so that his compensation ver a reasonable future time would average at least the $26,050 e was then making. Nine years is longer than a reasonable ime. How can any portion of compensation averaging less than 26,050 in nine years be deemed unreasonable?

If comparability between the business of Derry Warehouse o. and the business of Petitioner is necessary before ertinency can be accorded Mr. Rodgers earning $26,050 per ear from Derry Warehouse Co. under arm's length conditions, uch comparability is established by the below quotations from he stipulation:

> "In 1952 Mr. Rodgers was made the manager of Derry Warehouse Co., a grain elevator company near Rickreall, Oregon. ...When Messrs. Rodgers and Giesy left Derry Warehouse, they formed Pacific Grains, Inc. in February 1955, and commenced operations literally 'across the street' from Derry Warehouse and directly competed with Derry Warehouse." (R 19, Stip. para. 13) emphasis added.

irect competition between two companies in the same business, cross the road from each other, indicates a certain amount of omparability. More important than comparability is the fact hat Petitioner headed by Mr. Rodgers was successful in the ompetition. Why is it unreasonable for Petitioner to pay to r. Rodgers average annual compensation less than the amount reviously paid Mr. Rodgers by Petitioner's arch competitor?

In the ordinary "reasonable compensation" case, the amount paid "A" for job "X" is used to establish the reasonableness of the amount paid "B" for job "Y". Naturally, there must be a demonstrated equivalency between job "X" and "Y" for the comparison to make any sense. A completely different situation is presented when "A" and "B" are the same person. Then the algebraic formula starts with a known identity, and the demonstrated ability of "A" to make so many dollars in job "X" should go a long way toward supporting the reasonableness of paying "A" the same dollars to leave job "X" and take job "Y", regardless of similarity between jobs "X" and "Y". All doubt is resolved concerning the reasonableness of compensation in such a situation if job "Y" is competitive with "X", and "A"s performance of job "Y" results in successful competition.

The Tax Court attaches no significance to Mr. Rodgers' employment by Derry Warehouse Co. at $26,050 per year because the Court found a lack of comparability between the business of Petitioner during the years here involved and the business of Derry Warehouse Co. when Mr. Rodgers was manager. Any such differences are attributable to a change in corporate direction of Petitioner instigated by Mr. Rodgers to overcome an adverse economic development, as related in the following substantially direct quotation from the stipulation:

> In 1961 the Federal Government's soil bank programs resulted in the removal from production of substantial acreage in petitioner's area. To

> off-set the loss of storage income, Rodgers decided to become active in trading grass seed on a world-wide basis. This was a highly speculative venture, and a serious error in judgment would have been financially disastrous to the company. Constant devotion and study to weather and crop conditions throughout the world was required. Despite the decrease in acreage and production in the area, petitioner increased its sales volume. (R 18, Stip, para. 8-9)

change in corporate direction which successfully copes th an adverse economic development enhances the value of e president's services. Moreover, Mr. Rodgers was required accept far more responsibility, to exert far more skill d to work far more hours than required by his duties as nager for Derry Warehouse Co.

Another reason given by the Tax Court for ignoring mpensation paid to Mr. Rodgers in prior years is that the rporate resolutions authorizing the bonuses for the years ded January 31, 1963 and 1964 failed to "...indicate such nuses were intended as compensation for services rendered him in prior years" (R 82). Nothing in the above quotation rom Treas. Reg. Sec. 1.404(a)-1 or any reported case[6] ndicates that amounts paid during prior years are taken into count only when corporate resolutions expressly state the

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6 See, e.g., Ernest Burwell, Inc. v. United States, pra note 5, at 30; Jewel Ridge Coal Sales Co., Inc., supra te 5, at 143.

mounts are intended as compensation for preceding years. he full picture is taken into account unless something xpressly limits compensation for a particular year to the ervices performed during that year alone.[7] There is no such imitation in the instant resolutions. Furthermore, Mr. Rodgers nequivocally testified that there was no intent in the rior years to pay him compensation commensurate with his orth (Tr 21). This uncontradicted testimony was corroborated y that of Mr. Giesy. (Tr 57)

Numerous tests have been devised by the courts to easure the reasonableness of corporate compensation paid o a controlling stockholder. The basic objective of uch tests is to ascertain what compensation would have volved from arm's length bargaining, i.e., what would the orporation have been required to pay if it were not controlled y the recipient. In the present case the answer to this ltimate question is readily apparent without applying ny of these tests. Simulation is unnecessary in the resence of actuality. Obviously, Mr. Rodgers could not

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7 Even if the compensation was limited to the ervices performed during that year alone, the underpayment n prior years still would not be excluded from consideration. s observed by the court in Commercial Iron Works v. ommissioner, 166 F.2d 221, 224 (5th Cir. 1948) it is reasonable usiness practice "for an employer to recognize and reward acrifices made by employees in hard, formative days by ranting a more generous compensation in the days that are ush."

ave been enticed away from Derry Warehouse Co. by
nother corporation in which he owned no stock unless he
as assured that within a reasonable time in the future his
ompensation from the other corporation would aggregate an
mount at least equal to what he could expect if he stayed
ith Derry Warehouse Co. at the $26,050 per year then being
aid him. It might not be reasonable for Mr. Rodgers to
nsist upon receiving in the aggregate what he would have
eceived from Derry Warehouse Co. if he had failed to produce
or Petitioner. However, Mr. Rodgers produced for Petitioner,
s evidenced by the steadily increased retained earnings,
fact which even the Tax Court recognized. Since the
ggregate compensation paid to Mr. Rodgers by Petitioner
or the nine year period through January 31, 1964 was less
han what Mr. Rodgers would have received from Derry
arehouse Co. at $26,050 per year, none of the compensation
aid him through January 31, 1964 could have been unreasonable.
his is Petitioner's irrefutable proposition which makes it
nnecessary to determine whether Mr. Rodgers and the
orroborating witnesses were correct in their belief that
he compensation paid Mr. Rodgers for the years at issue was
easonable when judged on the basis of those years alone.

THIRD SPECIFICATION OF ERROR

The Tax Court erred in holding it was not bound by he uncontradicted and unimpeached testimony of Mr. Lees and r. Wiley.

ARGUMENT

Mr. Lees, an employee in a comparable position with a orporation which was in competition with Petitioner and omparable in all respects to the Petitioner except that unlike he Petitioner it did not operate any grain elevators, testified hat his compensation was comparable to the compensation received y Mr. Rodgers from the Petitioner for the fiscal years here nvolved (Tr 40-1, 45-8). Mr. Lees further testified that in iew of Petitioner's net profits such compensation was not nusual (Tr 46) and that he knew of other men in comparable ositions in the trading business whose compensation was about he same as Mr. Rodgers' (Tr 45).

Mr. Wiley, whose business is comparable in its major espects to the trading operations of the Petitioner, also estified that his compensation was comparable to the compensation eceived by Mr. Rodgers from the Petitioner for the fiscal years ere involved (Tr 53-5).

Comparableness of the compensation received by others ccupying comparable positions in the same business has long een one of the most important criterion for determination of

easonableness. However, the Tax Court arbitrarily ignored he above testimony holding itself not bound thereby even hough uncontradicted and unimpeached and proceeded to deter- ine the question without assistance of evidence although the ax Court was devoid of knowledge and experience in this area. n so holding the Tax Court was in error.

The Tax Court cited as the authority for its position olden Construction Co. v. Commissioner, 228 F2d. 637 (10th. ir. 1955). In Golden Construction Co. v. Commissioner, supra t 639, the taxpayer had introduced opinion testimony of everal witnesses to the effect that the compensation paid was easonable and the Commissioner had introduced testimony of a itness, who was in a comparable position in a comparable usiness in the same industry, that his salary and that of the ther officers of the company were less than that paid to tax- ayer's employee. The Court held that the Tax Court could eigh the conflicting evidence as it saw fit and did not have o accept the opinion testimony over that of the Commissioner's itness. However, there was no conflicting evidence regarding he reasonableness of Mr. Rodgers' compensation in the present ase, and if the rule of Golden Construction Co. is as asserted y the Tax Court in the present case, it is clearly contrary

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8 See, e.g., Builders Steel Co. v. Commissioner, 197 F.2d 63, 265 (8th Cir. 1952); Patton v. Commissioner, 168 F.2d 28, 1, (6th Cir. 1948); Treas. Reg. § 1.162-7(b) (3).

the weight of the authority as well as the rule of his Court. In Grace Bros. v. Commissioner, 173 F.2d 170, 74 (9th Cir. 1949), this Court declared:

> "It is axiomatic that uncontradicted testimony must be followd. [Citations] The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable."

he rule was reiterated by this Court in Anaheim Union Water o. v. Commissioner, 321 F.2d 253, 260 (9th Cir. 1963):

> "The testimony as to the fair market value of the water being uncontradicted and unimpeached, it was not permissible to assume a value at variance with the testimony."

In support of its holding in Anaheim Union Water Co. . Commissioner, supra, this Court cited as authority Loesch Green Construction Co. v. Commissioner, 211 F.2d 210 (6th ir. 1954). In Loesch & Green Construction Co., as in the resent case, the Tax Court had ignored the uncontradicted nd unimpeached testimony concerning the reasonableness of he compensation paid. In reversing the Tax Court, the

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9 See, e.g., Banks v. Commissioner, 322 F.2d 530, 37 (8th Cir. 1963); Erie Stone Company v. United States, 04 F.2d 331, 348 (6th Cir. 1962); Gordon v. Commissioner 68 F.2d 105, 107 (3d Cir. 1959); Indalantic, Inc. v. ommissioner, 216 F.2d 203, 205 (6th Cir. 1954)

10 See, e.g., Anaheim Union Water Company v. ommissioner, 321 F.2d 253, 260 (9th Cir. 1963); Grace Bros. . Commissioner, 173 F.2d 170, 174 (9th Cir. 1949).

ixth Circuit declared:

> "Their testimony was unimpeached and should have been accepted by the Tax Court in a matter in which it had no knowledge or experience upon which it could exercise independent judgment; and such evidence cannot be arbitrarily disregarded. ...Where unimpeached, competent and relevant testimony on behalf of a taxpayer is uncontradicted, it may not be arbitrarily discredited and disregarded, and the Tax Court cannot reject or ignore this evidence and determine the propriety of the amount of salaries paid upon its own innate conception of reasonableness." Id. at 212. [11]

The Commissioner in the present case presented no estimony or other evidence to contradict the witnesses. either of the witnesses were impeached and their veracity was n no way questioned by the Tax Court. Therefore, since the ax Court had no knowledge or experience upon which it could xercise an independent judgment, the testimony of both Mr. Lees nd Mr. Wiley was binding on the Tax Court. Mr. Lees and r. Wiley both having testified to the comparableness of r. Rodgers' compensation, the Tax Court was required to accept uch evidence with its strong inference of reasonableness.

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11 Accord, Indialantic, Inc. v. Commissioner, supra ote 9, at 205: "This court has repeatedly held that the ax Court is not authorized to disregard uncontradicted estimony concerning the worth and the reasonableness of ervices rendered. The value of the services is unquestioned nd the decision of the Tax Court ignores the undisputed acts."

FOURTH SPECIFICATION OF ERROR

The Tax Court erred in refusing to admit into evidence ıe testimony of Mr. Lees concerning his opinion of the ?asonableness of the compensation paid by Pacific Grain, ıc. to Mr. Rodgers.

ARGUMENT

Petitioner attempted at the time of trial to introduce)inion testimony of Mr. Lees as to the reasonableness of the)mpensation paid by Petitioner to Mr. Rodgers. The Tax Court :ld, however, that it did not want Mr. Lees' opinion and ıat he could not testify as to his opinion of the reasonable- :ss of Mr. Rodgers' compensation since he was not an expert Tr 42-4, fully set forth in Appendix "A"). In so holding ıe Tax Court was in error.

The Courts have long allowed and accepted opinion estimony concerning the reasonableness of compensation.[12] ıe only expertise required of the witness is that he be ıamiliar with the particular trade or business in the local rea, with the taxpayer in his operations, and with the ıpabilities and work of the employee whose compensation is n question.[13] The testimony of Mr. Lees clearly depicts this

12 See, e.g., Loesch & Green Construction Co. v.)mmissioner, 211 F.2d 210, 211-212 (6th Cir. 1954); R. F. arnsworth & Co., Inc. v. Commissioner, 203 F.2d 490, 492 5th Cir. 1953); Idaho Livestock Auction, Inc. v. United States, 87 F. Supp. 875, 879 (E. D. Idaho 1960); Jewel Ridge Coal ales Co., Inc., 16 CCH Tax Ct. Mem. 140, 143 (1957).

13 Ibid.

miliarity and thus his competence to testify concerning
s opinion of the reasonableness of the compensation paid to
. Rodgers (Tr 40-8).

The Tax Court had no experience or knowledge of its
n as to the reasonableness of salaries paid in the trading
siness. Thus, the opinion of reasonable compensation from a
mpetent witness in the trading business was of value. The
x Court should have therefore admitted and considered the
inion testimony of Mr. Lees.[14]

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14 See, e.g., Loesch & Green Construction Co. v.
mmissioner, supra note 12 at 211-12.

FIFTH SPECIFICATION OF ERROR

The Tax Court erred in failing to recognize and to be ound by the testimony of Mr. Rodgers that the compensation aid to him by Pacific Grains, Inc. for the fiscal years nding January 31, 1963 and January 31, 1964 was reasonable.

ARGUMENT

While the Tax Court did not permit Mr. Lees to testify s to his opinion of the reasonableness of the compensation aid to Mr. Rodgers, it did allow Mr. Rodgers to do so. r. Rodgers testified that he did not believe his compensation or the years here involved to be unreasonable (Tr 21-22). his testimony the Tax Court completely ignored and failed o consider in rendering its decision. In so doing, the ax Court erred.

No one was in a better position to know what was easonable compensation than Mr. Rodgers and he testified hat the compensation was reasonable.[15] As observed by the ourt in Gordy Tire Co. v. United States, 296 F.2d 476, 479 Ct. Cl. 1961).

> "Even people with an interest in the nature of their testimony are expected to tell the truth, and must be presumed to have done so, unless the contrary appears".

he integrity of Mr. Rodgers is above reproach (Tr 411). he Commissioner did not attempt to discredit such testimony

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15 Gordy Tire Co. v. United States, 296 F.2d 476, 478 Ct. Cl. 1961)

n cross-examination and did not present any direct testimony
r other evidence showing the compensation to be unreasonable.
he testimony of Mr. Rodgers should have therefore been
onsidered by the Court.

Since the Tax Court was required to consider the
estimony and since the testimony was uncontradicted and
nimpeached, the Tax Court was bound by this testimony to find
hat the compensation was reasonable,[16] especially in view of
he other substantial evidence presented by the Petitioner.
t is of no consequence that the testimony is of an interested
ather than a disinterested party.[17] Admittedly, such testimony
s not the most satisfactory, but as was already discussed
he Tax Court erroneously excluded the corroborating testimony
hich Petitioner had intended to present. Moreover, if the
ompensation was unreasonable in the present case, the
ommissioner should have been able to produce at least one
itness that could have so testified.

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16 See, e.g., Anaheim Union Water Co. v. Commissioner, upra note 10, at 260; Grace Bros. v. Commissioner, supra note 0 at 174. See generally, discussion at pp. supra.

17 See e.g., Ansley v. Commissioner, 217 F.2d 252, 56-257 (3rd. Cir. 1954); A. & A. Tool & Supply Co. v. ommissioner, 182 F.2d 300, 303-04 (10th. Cir. 1950).

SIXTH SPECIFICATION OF ERROR

The Tax Court erred in holding that the evidence concerning the rate of return on the invested capital of Pacific Grains, Inc. for the fiscal years ending January 31, 1963 and January 31, 1964 was of scant value.

ARGUMENT

The rate of return on invested capital (capital plus retained earnings) has long been recognized as an important criterion by the Courts[18] and the Internal Revenue Service,[19] and in recent Court of Claims cases the rate of return on invested capital has played a vital role in the determination of reasonable compensation.[20] The rate of return on invested capital is important because income can only be earned through the use of capital or labor. Therefore, if the capital is being satisfactorily compensated for its use, a very strong inference arises that labor is not being unreasonably

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18 See, e.g., Olympia Veneer Co., 22 B.T.A. 892, 906-07 (1931) acq. X-2 Cum. Bull. 53; Benz Brothers Co., 20 B.T.A. 1214, 1222 (1930) acq. X-1 Cum. Bull. 6; The Law and Credit Co., 5 B.T.A. 57, 60 (1926) acq. VI-I Cum. Bull. 4.

19 See, e.g., A.R.R. 53, 2 Cum. Bull. 110 (1920).

20 See, e.g., Boyd Construction Co. v. United States, 339 F.2d 620,624 (Ct. Cl. 1964); Bringwald, Inc. v. United States, 334 F.2d 639,642,644 (Ct. Cl. 1964); Gordy Tire Co. v. United States, 296 F.2d 476, 478-79 (Ct. Cl. 1961).

ompensated for its efforts in producing the income.

In the present case, Petitioner established by tipulated facts and uncontradicted testimony that Petitioner ad received a highly satisfactory rate of return from its nvested capital. It was stipulated that Petitioner had a eturn on invested capital of 15.57% and 15.41% for the espective years here involved after payment of Mr. Rodgers' ompensation and Federal income taxes (R 74). It was also tipulated that Petitioner had an average rate of return n invested capital for the first nine years of 18.92% (R 74). hese figures are substantially above the national average of he five hundred largest corporations, which was 9.1% and 0.5% for the respective years here involved, as well as bove the average return on invested capital of eight large orporations which were somewhat comparable to Petitioner Tr 32-4).

Mr. Brevig, the certified public accountant for etitioner, testified that he did accounting work for ther local companies that could be considered comparable to etitioner and that he determined by computation that not ne of these other clients had a higher rate of return on nvested capital (Tr. 34). Mr. Brevig explained that the ocal companies to which he referred were primarily in the rading business like the Petitioner and that trading was

t least as large a part of their business as it was of the etitioner's business. (Tr 35) The Commissioner did not iscredit such testimony on cross-examination and did not resent any testimony or other evidence to show the contrary.

The Tax Court, however, held the above testimony and tipulated facts to be of "scant value" on the basis that etitioner did not make its comparison with comparable ompanies (R 81-2). In so holding, the Tax Court completely gnored the testimony of Mr. Brevig that comparable local rading firms had no greater return on invested capital than etitioner and the fact that in only three fiscal years has etitioner had a better rate of return than the 15.57% and 5.41% for the years here involved. Being uncontradicted nd unimpeached, the Tax Court could not arbitrarily disregard uch evidence.[21]

Comparableness or no comparableness, it is hard to see ow an after-tax return on invested capital of over 15% can be aid to be less than highly satisfactory.[22] Whether one looks to ne rate of return for the five hundred largest corporations r for the trading firms in the local area, a rate of over 5% is a most satisfactory return. With the Commissioner

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21 See, e.g., Anaheim Union Water Company v. Commissioner, upra note 10, at 260; Grace Bros. v. Commissioner, supra note), at 174. See generally, discussion at pp. 36-8, supra.

22 A return on invested capital of over 15% compares uite favorably with returns of 5.8% and 8.8% which the court n Gordy Tire Co. v. United States, supra note 20, at 479, found o be satisfactory.

resenting no testimony or other evidence to the contrary, he Tax Court was required to find that the invested capital n Petitioner was being satisfactorily compensated for its use nd that by reason thereof a very strong inference arises that r. Rodgers was not being paid more than a reasonable compensa- ion for his services during the years here involved.

SEVENTH SPECIFICATION OF ERROR

The Tax Court erred in holding that Pacific Grains, c. had failed to meet its burden of proof and that the de- rmination of the Commissioner must be sustained.

ARGUMENT

The Tax Court held that the Petitioner had failed to et its burden of proof and thus the determination of the mmissioner must be sustained. The Tax Court so held spite the introduction of uncontradicted and unimpeached idence showing:

(1) That substantial skill, hard work and heavy responsibility was required of Mr. Rodgers and that the Petitioner was heavily dependent thereon,

(2) That in the opinion of Mr. Rodgers the compensation paid to him was reasonable,

(3) That Mr. Rodgers' compensation was comparable to the compensation paid others in comparable positions in the trading business,

(4) That Petitioner had underpaid Mr. Rodgers in prior years and had from the time of its forma- tion through the years here involved paid him an average annual compensation of only $22,860,

(5) That for the three years immediately prior to his employment with Petitioner, Mr. Rodgers had received an average annual compen- sation of $26,050 from one of Petitioner's

competitors, Derry Warehouse Co., a company in which Mr. Rodgers held no stock, and that his duties for Derry Warehouse Co. required far less skill, work and responsibility than his present duties for Petitioner,

(6) That the invested capital in Petitioner was highly compensated for its use in the years here involved, which very strongly infers that Mr. Rodgers was not being paid more than a reasonable compensation for his services during the years here involved.

Obviously, the above evidence was sufficient to spel the presumption of correctness in favor of the mmissioner's determination, for as was stated by this urt in Gersteen v. Commissioner, 267 F.2d 195, 199 th Cir. 1959), the presumption disappears "upon the oduction of evidence from which the determination could found inaccurate". Accord, Clark v. Commissioner, 6 F.2d 698, 706 (9th Cir. 1959). With the presumption spelled, the Tax Court was required to render its decision only on the basis of the evidence presented.

To support his determination against the evidence the Petitioner, the Commissioner presented no testimony other evidence, but relied solely on certain stipulated cts which the Commissioner asserted gave the impression at part of the compensation for the years here involved

oked like a disguised dividend. However, when these cts are viewed within the context of this case, as was eviously discussed herein at pages 21 through 27, the ference does not readily follow from these facts. A r more logical explanation appears which in no way dicates either a disguised dividend or unreasonable mpensation.

In view of the Commissioner's failure to present y evidence, or at the most no more than an inference dubious weight, the Tax Court's holding that the Petioner had failed to meet its burden of proof despite the bstantial and significant evidence presented was "clearly roneous".[23] The evidence presented by the petitioner clearly showed the Commissioner's determination to be ong that the decision in the Commissioner's favor was lpably in error. The Tax Court cannot substitute its n innate conception of reasonableness in place of the gnificant and substantial evidence to the contrary.

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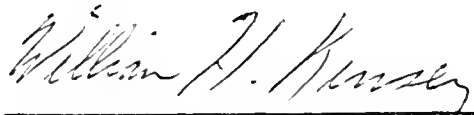
23 Findings of a court are never conclusive d shall be overturned if "clearly erroneous". "A nding is 'clearly erroneous' when although there is idence to support it, the reviewing court on the entire idence is left with the definite and firm conviction at a mistake has been committed." United States v. ited States Gypsum Co., 333 U.S. 364, 394 (1948); ace Bros. v. Commissioner, 173 F.2d 170, 174 (9th r. 1949).

CONCLUSION

For the reasons set forth above, this Court should verse the decision of the Tax Court and allow Petitioner deduction for all the compensation paid to Mr. Rodgers r the fiscal years ended January 31, 1963 and January 31, 64.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON



William H. Kinsey
12th Floor, Standard Plaza
Portland, Oregon 97204

Of Attorneys for Appellants

CERTIFICATE

I certify that, in connection with the preparation
this brief, I have examined Rules 18 and 19 of The
ited States Court of Appeals for the Ninth Circuit,
d that, in my opinion, the foregoing brief is in full
mpliance with those rules.

William H. Kinsey

William H. Kinsey

Of Attorneys for Appellant

APPENDIX "A"

Direct Examination

of

David Lees

MR. KINSEY: Petitioner will next call Mr. David Lees.

DAVID LEES

was called as a witness on behalf of the petitioner and, having been first duly sworn, testified as follows:

THE CLERK: For the record may we have your name.

THE WITNESS: Dave Lees.

THE CLERK: Your address, please.

THE WITNESS: 4140 Southwest Seventy-fifth, Portland, Oregon.

DIRECT EXAMINATION

BY MR. KINSEY:

Q. What is your occupation, Mr. Lees?

A. I am a grain trader and train carlot trader and also carlot seeds and commodities.

Q. And your business office is here in Portland?

A. That is right.

Q. Are you acquainted with Mr. Rodgers?

A. Yes.

Q. Are you competitors?

A. Yes.

Q. In the trading, I realize you don't have a grain elevator.

A. We are competitors and he is a supplier and also a customer.

Q. Would you say that your operations are comparable?

A. Similar, yes. We don't have any elevator and he has an elevator.

Q. How long have you known Mr. Rodgers?

A. Since about 1949, whenever he came to Oregon, and he was at Monroe, Oregon.

Q. And you were acquainted with him when he was managing Derry Warehouse?

A. Right.

Q. And all through the period that he has been president of Pacific Grains?

A. Right.

Q. Do you think that his worth as a trader is greater now than it was, say, in 1955?

A. Certainly.

Q. '54?

A. Certainly.

Q. How is Mr. Rodgers regarded in the trade, as competent or otherwise?

A. Real competent and he is a good trader and his contracts are good. His integrity is above reproach and he does a lot of business.

Q. Now, you may have heard Mr. Brevig's testimony that the net income of Pacific Grains for 1964 was $90,822, we will say ninety thousand in round figures. Previous testimony indicates that that was attributable to the efforts of Mr. Rodgers as a

trader. For a trader of Mr. Rodgers' capability and if he generated $90,000 of net income, what do you think would be reasonable compensation for the services so rendered?

MR. RANDALL: Your Honor, I would object to that question. I don't think the witness has demonstrated that he is qualified to pass on that.

THE COURT: Sustained. I don't want his opinion. If you have any-- this man operates a comparable business, you can ask him what he is being paid or anything like that but that doesn't qualify the witness as an expert on salaries or qualify him to give an opinion.

BY MR. KINSEY:

Q. May I ask this question. If Mr. Rodgers worked for you and generated $90,000 of net income, what would you consider to be reasonable compensation?

MR. RANDALL: Your Honor, again I object for the same reason.

THE COURT: Sustained. What you can show is what any comparable business actually paid in this community. But what some businessman's opinion is as to what would be a reasonable salary, that is something the court is going to have to find out and determine or would like to determine from what other businesses are actually paying but not from just an opinion by somebody else.

MR. KINSEY: Well, really what I am asking is what he

would hire Mr. Rodgers for if he--

THE COURT (interrupting): Which is just another way of asking for his opinion.

MR. KINSEY: That is correct.

THE COURT: That is just exactly what I say you can't do, ask for his opinion, he isn't qualified as an expert. Experts are the only ones that can give opinions.

MR. KINSEY: Well, don't you think there would be some relevancy to finding out what Mr. Rodgers could get if he quit Pacific Grains and hired out somewhere else?

THE COURT: Well, no, no, that is just another way of asking for an opinion. You brought out the fact that this man's business was comparable, I thought maybe you were going into what that business paid.

MR. KINSEY: Well, he doesn't want to say for the public record what he was making.

THE COURT: I am afraid he can't testify, can he. He can't give us his opinion that way.

MR. KINSEY: Well, then, I guess we have an insurmountable burden of proof in so far as that.

THE COURT: Oh, no, no. In that case you can show what the salary was paid officers of similar corporations doing much the same business. No, it isn't insurmountable. It isn't easy, I will tell you that, but it isn't insurmountable.

MR. KINSEY: As a matter of fact, I think that same

case of yours pointed out that they did not have any evidence of comparable--

THE COURT (interrupting): Oftentimes you don't have and that isn't fatal to your case.

MR. KINSEY: I didn't mean our whole burden, I meant as far as showing what comparable salaries were.

THE COURT: I can't remember what case it is, I did have cases where they did have testimony of comparable business. But it isn't insurmountable. Frequently, you can show it.

BY MR. KINSEY:

Q. May I ask this, you stated that Mr. Rodgers was worth more today than he was back in 1954.

MR. KINSEY: Again this might be opinion, I was going to ask whether he could express that in percentages.

THE COURT: Well, I think it was brought out that Mr. Rodgers--you had a perfect right to bring out his competency and his position and you have brought that out.

MR. KINSEY: I guess I could ask whether his compensation was more or less than Mr. Rodgers.

THE COURT: You have already brought out that he is in a comparable business.

MR. KINSEY: Could we have a little recess?

THE WITNESS: Can I say something?

MR. KINSEY: Yes.

THE WITNESS: I think in our business and independent

trading business that the majority of your good, aggressive traders, their compensation is all about proportionately the same. I know of competitors whose compensation is about the same as Mr. Rodgers. We are a trading organization and everything about us is trading. In other words, if a man does a good job and he asks for more money and we are making more money, why shouldn't he make more money, and we don't work on percentages, we work--if we buy a car of corn and we make $2.50 we trade it.

THE COURT: I think you better confine this to questions and answers.

BY MR. KINSEY:

Q. Would you care to state, Mr. Lees, whether your compensation--

THE COURT (interrupting): First, I would like to know whether or not Mr. Lees' position is comparable in his business to Mr. Rodgers'.

BY MR. KINSEY:

Q. Would you explain--

THE COURT (interrupting): Is it comparable, would you say?

THE WITNESS: You mean in position?

THE COURT: Yes.

THE WITNESS: I own a corporation.

THE COURT: Do you care to tell us what you are

getting?

THE WITNESS: I won't tell you my salary but I would say it is comparable to what Mr. Rodgers gets. It is comparable in percentage of business, gross profit and net profit.

BY MR. KINSEY:

Q. And in dollar amount, too?

A. And dollar amount, I mean in proportion and net profit, it is about the same. This is not unusual.

THE COURT: That is much better than his opinion.

MR. KINSEY: It certainly is.

THE WITNESS: It is not unusual in trading companies.

MR. KINSEY: I just wondered whether you consider you have gained something from that testimony. I think it is quite effective but I just wondered.

THE COURT: I think it is much better than his opinion.

MR. KINSEY: He just said comparable, but I just wondered if you figured that gives you any clue.

THE COURT: That's enough.

MR. KINSEY: All right. Your witness.

CROSS-EXAMINATION

BY MR. RANDALL:

Q. You stated that the compensation was comparable. Do you mean comparable for the years before the court or for the years subsequent. The years before the court are 1963 and 1964. The total salary in 1963 was $41,250, and in 1964 the

APPENDIX "B"

hibit No.	Offered	Identified	Received
A through E	3	3	3

No. 21,671

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PACIFIC GRAINS, INC., AN OREGON CORPORATION,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF
THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

RICHARD C. PUGH,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
HOWARD J. FELDMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

I N D E X

CITATIONS

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Cases (continued): Page

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Miscellaneous:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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ON PETITION FOR REVIEW OF THE DECISION OF
THE TAX COURT OF THE UNITED STATES

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (I-R. 75-83) are not officially reported.

JURISDICTION

This petition for review (I-R. 85-86) involves federal income taxes for the fiscal years ending January 31, 1963, and January 31, 1964. On May 18, 1965, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency, asserting deficiencies in income tax in the amount of $5,850 for the fiscal year ending January 31, 1963, and in the amount of $12,408.06 for the fiscal year ending January 31, 1964. (I-R. 21-24.) Within ninety days thereafter, or on August 6, 1965, the taxpayer filed a petition

with the Tax Court for a redetermination of those deficiencies und the provisions of Section 6213 of the Internal Revenue Code of 195 (I-R. 1-2.) The decision of the Tax Court was entered January 13, 1967. (I-R. 84.) The case is brought to this Court by a petition for review filed January 31, 1967 (I-R. 85-86), within the three-month period prescribed in Section 7483 of the Internal Revenue Co of 1954. Jurisdiction is conferred on this Court by Section 7482 that Code.

QUESTION PRESENTED

Whether there is substantial evidence to support the Tax Cour finding that reasonable compensation deductible by taxpayer for salary and bonus payments made to its sole shareholder and preside was $30,000 for each of the fiscal years ending January 31, 1963, and January 31, 1964.

STATUTES AND REGULATIONS INVOLVED

The statutes and Regulations involved are set out in the Appe infra.

STATEMENT

The facts as stipulated (I-R. 15-20) and as found by the Tax (I-R. 76-79) may be summarized as follows:

Taxpayer, Pacific Grains, Inc., was organized under the laws Oregon on February 19, 1955, and its principal office is in Rickre Oregon. Taxpayer filed federal income tax returns for the fiscal years ended January 31, 1963 and 1964, with the District Director of Internal Revenue, Portland, Oregon. Robert R. Rodgers presentl

owns all of the taxpayer's outstanding shares of common stock (2,000 shares). During the years here involved taxpayer was engaged in the business of purchase, sale, storage, distribution and brokerage of grain and grass seed. (I-R. 76.)

Robert R. Rodgers formed the taxpayer-corporation together with Wayne R. Giesy, with Rodgers serving as president and treasurer and Giesy serving as vice-president. Taxpayer's principal asset originally was a grain elevator with a capacity of approximately 300,000 bushels. Later in 1955, taxpayer built another grain elevator at Suver, Oregon, with a capacity of 50,000 bushels, and in 1960 taxpayer leased a grain elevator at Dallas, Oregon, with a capacity of 50,000 bushels. In February, 1959, Giesy sold his stock in taxpayer to Rodgers, who agreed to assume all of the liabilities which had been incurred by the parties in their venture. Rodgers then took over the duties previously performed by Giesy. (I-R. 76-77.)

In 1961, the Federal Government initiated the soil bank and diversified feed-grain programs and as a result the production acreage in this area was reduced. To offset the loss of grain storage income, taxpayer became active in trading grass seed on a world-wide basis. (I-R. 77.)

Taxpayer's over-all investment in grain storage facilities in 1963 and 1964 was approximately $260,000 and $340,000, respectively. Taxpayer's total sales for the fiscal years ending January 31, 1962 through 1964, were $1,709,364.73, $1,724,318.86 and $2,289,001.45, respectively. During the years here involved taxpayer's income from

grain storage and cleaning represented approximately 15 percent of its gross income, and the remaining 85 percent was earned through i brokerage operations. (I-R. 77.)

During the years here involved Robert R. Rodgers was president and treasurer of the taxpayer, Thelma M. Rodgers was the secretary, and William H. Kinsey was assistant secretary. The same three individuals also served as the directors of the corporation during this period. (I-R. 77.)

Taxpayer paid a base salary of $25,200 to Robert Rodgers in each of the fiscal years ending January 31, 1963 and 1964. At a special meeting of taxpayer's board of directors held on December 2 1962, a bonus payment to Rodgers was authorized for the fiscal year ending January 31, 1963, in an amount not less than $15,000 nor mor than $20,000. At a special meeting of the board of directors held on December 27, 1963, a bonus payment to Rodgers was authorized for the fiscal year ending January 31, 1964, in the amount of $30,000. (I-R. 77-78.) The following schedule shows taxpayer's taxable inco and the base salary and bonus payments made to Rodgers in the fisca years ended January 31, 1960 through 1964 (I-R. 78):

Fiscal Year Ending 1/31	Corporate Taxable Income	Base Salary	Bonus	Total
1960	$ 3,642.79	$12,000	$10,000	$22,000
1961	(16,838.48)	22,000	None	22,000
1962	24,681.67	24,000	5,000	29,000
1963	26,362.78	25,200	16,050	41,250
1964	34,630.25	25,200	30,000	55,200

Taxpayer's other principal employees (on the basis of salary) received the following compensation in the fiscal years ended January 31, 1963 and 1964 (I-R. 78):

	F/Y 1/31/63		F/Y 1/31/64	
Name	Wages	Bonus	Wages	Bonus
Neil Evenson	$9,828.75	$2,500	$14,828.75	$5,000
Joel Miller	5,952.45	500	6,452.45	1,000
J.D. Montgomery		500		1,000

The balance sheets included in taxpayer's federal income tax returns for its fiscal years ended January 31, 1963 and 1964, indicate an earned surplus and undivided profits as of January 31, 1963 and 1964, in the respective amounts of $75,730.26 and $99,904.91. No dividends have been paid by taxpayer since its organization. (I-R. 78.)

Taxpayer claimed a deduction for compensation paid to Rodgers in the total amount of $41,250 for the fiscal year ended January 31, 1963, and in the total amount of $55,200 for the fiscal year ended January 31, 1964. The Commissioner, in his statutory notice of deficiency, disallowed the amount claimed by taxpayer as a deduction for compensation to Rodgers in excess of $30,000 in each of the fiscal years ended January 31, 1963 and 1964. (I-R. 78-79.) The Tax Court approved of the Commissioner's determinations and found that reasonable compensation for each year was $30,000. (I-R. 83.)

SUMMARY OF ARGUMENT

What is reasonable compensation is essentially a factual question to be determined by the peculiar circumstances in each case in accordance with certain generally accepted considerations and the overriding

principles set forth in Section 162(a)(1) of the Internal Revenue Code of 1954 and the Treasury Regulations promulgated thereunder. The Tax Court was the trier of facts. The circumstances surrounding the so-called "bonus" payments here in question -- i.e., those made to a corporation's sole shareholder-president who also controlled its board of directors under resolutions from the board originating late in each of the years in question when no dividends had been declared since the corporation's inception -- as found by the Tax Court, ran afoul of the above-mentioned considerations and principle The facts support the Tax Court's conclusion that reasonable compensation for each of the years in question was $30,000.

The question of the weight of the evidence and the credibility of the testimony introduced was for the trier of the facts. Since the taxpayer has not shown the ultimate findings below to be clearly erroneous, and plainly has not sustained its burden of proving the claimed salary amount to be correct, the Tax Court's decision should be affirmed.

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TAX COURT'S FINDING THAT REASONABLE COMPENSATION DEDUCTIBLE BY TAXPAYER FOR SALARY AND BONUS PAYMENTS MADE TO ITS SOLE SHAREHOLDER AND PRESIDENT WAS $30,000 FOR EACH OF THE FISCAL YEARS ENDING JANUARY 31, 1963, AND JANUARY 31, 1964

The sole issue on this review is whether there is substantial evidence to support the Tax Court's finding that reasonable compensation deductible by taxpayer for salary and bonuses paid to Robert R. Rodgers, its president and sole shareholder, was $30,000 for each of

the fiscal years ending January 31, 1963, and January 31, 1964. This, of course, is a pure question of fact, and the determinations of the Tax Court, which had an opportunity to pass on the credibility of the witnesses, the weight of the evidence, and the inferences to be drawn therefrom, are conclusive if supported by substantial evidence. Helvering v. Nat. Grocery Co., 304 U.S. 282, 294-295; Hoffman Radio Corp. v. Commissioner, 177 F. 2d 264, 266 (C.A. 9th); Kennedy Name Plate Co. v. Commissioner, 170 F. 2d 196 (C.A. 9th); E. Wagner & Son v. Commissioner, 93 F. 2d 816, 818 (C.A. 9th); Perlmutter v. Commissioner, 373 F. 2d 45, 47 (C.A. 10th); Golden Construction Co. v. Commissioner, 228 F. 2d 637, 638 (C.A. 10th); Standard Asbestos Mfg. & Insulating Co. v. Commissioner, 276 F. 2d 289 (C.A. 8th), certiorari denied, 364 U.S. 826. We submit that there is ample evidence in the record to sustain the findings of the Tax Court and its decision should be affirmed.

Section 162(a)(1) of the Internal Revenue Code of 1954, Appendix, infra, permits a deduction for a reasonable allowance for salaries or other compensation for personal services actually rendered. The Regulations interpreting this Code section provide that bonuses will constitute allowable deductions provided that such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. Treasury Regulations on Income Tax (1954 Code), Section 1.162-9, Appendix, infra. Pursuant to these provisions, the Commissioner reduced the allowable deduction for compensation paid to Rodgers from $41,250 (consisting of a salary of $25,200 and a bonus of $16,050) to $30,000 for the fiscal year

January 31, 1963, and from $55,200 (consisting of a salary of $25,2 and a bonus of $30,000) to $30,000 for the fiscal year ending January 31, 1964. (I-R. 22-23, 78.)

Many factors must be examined in determining whether compensation paid to an individual is reasonable and may be deducted by a corporation in its entirety. A list of factors, by no means all-inclusive, was set out in Mayson Mfg. Co. v. Commissioner, 178 F. 2 115, 119 (C.A. 6th):

> * * * the employee's qualifications; the nature, extent and scope of the employee's work; the size and complexities of the business; a comparison of salaries paid with the gross income and the net income; the prevailing general economic conditions; comparison of salaries with distributions to stockholders; the prevailing rates of compensation for comparable positions in comparable concerns; the salary policy of the taxpayer as to all employees; and in the case of small corporations with a limited number of officers the amount of compensation paid to the particular employee in previous years.

The situation must be considered as a whole, with no single factor decisive. Mayson Mfg. Co. v. Commissioner, supra, p. 119. In othe words, the circumstances of each case must be carefully examined to see whether deductions for compensation are reasonable. Perlmutter v. Commissioner, supra, p. 47; Golden Construction Co. v. Commissio supra, p. 638.

Here Rodgers, the payee, was the sole shareholder of taxpayer, its president and treasurer, and a member of its board of directors for both of the years in question. (I-R. 76-77.) In fact, Rodgers and his wife, who was secretary of the corporation and a board member, at all times controlled two out of the three board of directors' seats. (I-R. 77.) Only Rodgers and his wife were

present when the board awarded bonuses to Rodgers for each year here at issue. (I-R. 64, 68.) Special scrutiny must be given to compensation paid by corporations whose stock is closely held because of the lack of arm's length bargaining, which in turn may result in a distribution of profits under the guise of salary or bonus payments. Hampton Corp. v. Commissioner, decided June 1, 1964 (P-H Memo T.C., par. 64,150), affirmed per curiam June 11, 1965 (C.A. 9th) (16 A.F.T.R. 2d 5265); Perlmutter v. Commissioner, supra, p. 47; Logan Lumber Co. v. Commissioner, 365 F. 2d 846, 851 (C.A. 5th); Heil Beauty Supplies v. Commissioner, 199 F. 2d 193, 194 (C.A. 8th); Oswald v. Commissioner, 185 F. 2d 6, 9 (C.A. 7th); Commercial Iron Works v. Commissioner, 166 F. 2d 221, 224 (C.A. 5th). Here we have the classic example of a closely held corporation -- Rodgers is the sole shareholder and controls the board of directors -- and the resolutions of the board of directors are, for all intents and purposes, expressions of his will. See Golden Construction Co. v. Commissioner, supra, p. 638; Miles-Conley Co. v. Commissioner, 173 F. 2d 958 (C.A. 4th); Ecco High Frequency Corp. v. Commissioner, 167 F. 2d 583 (C.A. 2d).

The resolutions granting additional compensation to Rodgers were promulgated by the board of directors near the end of the year, when corporate profits could be approximated. (I-R. 64, 68, 81.) In fact, the bonus resolution adopted by the board of directors on December 28, 1962, for the fiscal year ending January 31, 1963, which granted a bonus "not less than $15,000 nor more than $20,000, the exact amount of such bonus to be left to the discretion of the president" (I-R. 64), appears to be specifically geared to the final profit generated by

taxpayer. This is a clear example of Rodgers' ability to adjust his bonus to the profit of the corporation at the end of the year and reduce corporate income by a salary deduction, rather than distribute a nondeductible dividend distribution. 1/

Taxpayer's practice of delaying declaration of bonuses until late in the fiscal year is especially subject to scrutiny when contrasted with the fact that no dividends were paid for the two years in question and, in fact, no dividends had been paid by taxpayer since its incorporation. (I-R. 81.) Yet earned surplus and undivided profits shown on balance sheets attached to taxpayer's income tax returns were $75,730.26 for the fiscal year ending January 31, 1963, and $99,904.91 for the fiscal year ending January 31, 1964. (I-R. 78.) Lack of dividends in the face of available profits and increased salaries has been cited as a key factor in denying unreasonable compensation deductions by a corporation. See Hampton Corp. v. Commissioner, supra; E. Wagner & Son v. Commissioner, supra, p. 819; Perlmutter v. Commissioner, supra; Miles-Conley v. Commissioner, supra, p. 960; Commercial Iron Works v. Commissioner, supra, p. 224.

It is also significant to note that Rodgers' abilities and his duties with respect to the trading business were well known to taxpayer when its board of directors set his salary for the fiscal year commencing February 1, 1962, at $2,100 per month, or $25,200 per year. (I-R. 59.) See Heil Beauty Supplies v. Commissioner, supra, p. 194; Builders Steel Co. v. Commissioner, 197 F. 2d 263 (C.A. 8th); Wenatchee

1/ In fact, taxpayer admits (Br. 24-25) that it deducted increased amounts for salaries to bring corporate profits to approximately the surtax exemption level.

Bottling Works v. Henricksen, 31 F. Supp. 763 (W.D. Wash.). Taxpayer had become active in the trading business in 1961, and the $29,000 paid to Rodgers for the fiscal year ending January 31, 1962, consisting of $24,000 in salary and $5,000 bonus would appear to reflect all increased compensation due to him for his services with respect to the trading aspects of the business. 2/ (I-R. 77, 80.) The record does not show an increase in Rodgers' duties and responsibilities commensurate with the sudden increase in compensation by 40 percent and 90 percent for the two years here at issue. 3/ (I-R. 80.) See Hoffman Radio Corp. v. Commissioner, supra, p. 266; E.B. & A.C. Whiting Co. v. Commissioner, 10 T.C. 102, 115.

Taxpayer notes (Br. 43-46) that it maintained a uniformly high return on its investment despite its deduction for compensation paid to Rodgers. This is only one factor in determining reasonable compensation. In fact, a comparison of Rodgers' compensation with other key corporate figures leads to the conclusion that such payments were excessive. For example, Rodgers' compensation was approximately 156 percent and approximately 159 159 percent of the taxable income for the fiscal years ending January 31, 1963, and January 31, 1964, respectively. (I-R. 78.) Stated differently, Rodgers' compensation

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2/ The $30,000 figure set by the Tax Court therefore gives Rodgers an approximate bonus of $5,000 for each year, consistent with the prior year's action by the corporation.

3/ Taxpayer argues (Br. 21-22, 25) that the Commissioner never complained about the increase of $7,000 in Rodgers' compensation to $29,000 for the fiscal year ending January 31, 1962, but, as pointed out above, Rodgers rendered additional services in the trading aspect of the business in that year for the first time, which merited the salary increase. Consistently, the Commissioner allowed approximately the same compensation for the next two fiscal years when the same services were being performed.

was 61 percent of taxpayer's income before the deduction of salaries for each of the years. (I-R. 78.) Moreover, his compensation was approximately 17 percent of the gross profit for the fiscal year ending January 31, 1963 (I-R. 25), and approximately 18 percent of the gross profit for the fiscal year ending January 31, 1964 (I-R. 34). Rodgers' compensation was also about twice the wages and bonuses paid to the three other principal employees for these two years (I-R. 78), and almost equal to taxpayer's total payroll for eight full-time and sixteen part-time employees for these years (I-R. 19, 25, 34). To summarize, the over-all picture shows increasing profits matched by higher salaries -- an indication of the drawing off of corporate profits to controlling shareholders. Miles-Conley v. Commissioner, supra.

Taxpayer argues (Br. 28-34) that the additional compensation paid to Rodgers is deductible as payment for prior services. However, nothing in the resolutions of the board of directors voting the increased compensation indicates that it was for anything except services performed in the year of payment. (I-R. 64, 68, 81-82.) See Perlmutter v. Commissioner, supra, p. 48; Pinkham Med. Co. v. Commissioner, 128 F. 2d 986 (C.A. 1st); Standard Asbestos Mfg. & Insulating Co. v. Commissioner, 276 F. 2d 289, 293 (C.A. 8th), certiorari denied, 364 U.S. 826; E.B. & A.C. Whiting Co. v. Commissioner, supra, p. 117. But taxpayer sidesteps this problem (Br. 12, 28) by lifting language from the Treasury Regulations on Income Tax (1954 Code, Section 1.404(a)-1, Appendix, infra--interpretin Section 404 of the Internal Revenue Code, Appendix, infra, dealing with

contributions to an employee's trust or annuity plan and compensation under a deferred payment plan--to devise a total aggregate compensation theory to justify its excessive deductions. Under this theory, it would be allowed to deduct at the end of any year an amount, in addition to the reasonable compensation payable for that year, which would bring a payee's total compensation for all years to a maximum aggregate reasonable compensation. But taxpayer's reliance on these Regulations is misplaced. Although contributions to such plans must be considered together with compensation for services to determine whether the total is reasonable for a particular year under Section 162 of the 1954 Code, that section and its interpretive Regulations contain no corresponding provisions to update all past compensation. 4/ Contributions under these plans for past services present a unique situation which may not be extended to additional compensation for past services. 5/

4/ Ernest Burwell, Inc. v. United States, 113 F. Supp. 26, 30 (W.D. S. Car.), and Jewell Ridge Coal Sales Co. v. Commissioner, decided February 14, 1957 (P-H Memo T.C. par. 57,030), do not support taxpayer's claim (Br. 28) that the language of the Regulations under Section 404, dealing with aggregate deductions, is applicable to Section 162.

5/ This is not to say that a corporation may not reward its employees for past services. See Lucas v. Ox Fibre Brush Co., 281 U.S. 111. But, as a first step, such compensation must be earmarked for past services, presumably by a board resolution. See Perlmutter v. Commissioner, supra, p. 48; Pinkham Med. Co. v. Commissioner, supra; Standard Asbestos Mfg. & Insulating Co. v. Commissioner, supra, p. 293; E.B. & A.C. Whiting Co. v. Commissioner, supra, p. 117. As noted above, taxpayer did not so earmark its additional payments. Next, it must be shown that the compensation for these past services was reasonable. Lucas v. Ox Fibre Brush Co., supra. Taxpayer's attempt to prove the latter without having specified the compensation as being for past services in the year of deduction appears to be only a tardy response to the Commissioner's disallowance of portions of the bonuses for the years in question as unreasonable.

Taxpayer seeks justification (Br. 21-27) in this total aggregat compensation theory in an analysis of the corporate tax structure which permits a surtax exemption for the first $25,000 of taxable income each year. Taxpayer appears (Br. 24-25) to devise a formula which would entitle it to deduct from net profit, as additional compensation, amounts which would reduce taxable income to the surta level, i.e., $25,000. There is no doubt that taxpayer is entitled t all legitimate deductions to reduce its income to the lowest possibl point for tax purposes. But it cannot carry over or save deductions from prior years to reduce income from later, more profitable years to the surtax level.

Next taxpayer compares (Br. 29-34) the average compensation it paid to Rodgers over a nine-year period, or $22,860, with the $26,05 average yearly compensation received from his prior employer, Derry Warehouse Company, and concludes that the bonus payments for the yea in question merely brought his average salary up to the amounts he earned from prior employment. Initially, it is important to point out that salaries received from Derry Warehouse are of little use fo comparative purposes since his services there were not comparable to his duties with taxpayer. (I-R. 82.) But, more important, taxpayer conveniently overlooks the other large benefit accruing to Rodgers due to his special relationship with taxpayer: He built up his equity in the corporation, first as a 50 percent shareholder and later as sole shareholder, and thus became the owner of the under-

lying assets generated by his and others' services. 6/ And taxpayer'

6/ He could, at any time, liquidate the corporation, or, better yet, declare a dividend from retained earnings to receive his "deferred

argument (Br. 29-30) that it could not have enticed Rodgers away from his prior employer in an arm's length transaction without assuring him that low compensation in the company's formative years would be made up in the future so as to average at least $26,050 is inconsistent with the fact that taxpayer was formed by Rodgers and Giesy in 1955 (I-R. 76); there was no enticing of a new employee by a guaranteed average annual salary, but merely the embarkation by Rodgers and Giesy upon a new corporate enterprise with the risks attendant thereto.

Taxpayer next argues (Br. 35-38) that the Tax Court was bound to accept the testimony of its witnesses when the Commissioner offered no rebuttal testimony. However, the rule in this Court is just the opposite -- the lower court is not bound to accept any uncontradicted testimony, but may examine all testimony in the light of the demeanor of the witnesses and the substance of their testimony, as well as all other facts in the record. Scates v. Isthmian Lines, 319 F. 2d 798, 799; Ramos v. Matson Nav. Co., 316 F. 2d 128, 132; Factor v. Commissioner, 281 F. 2d 100, 111, certiorari denied, 364 U.S. 933; N.L.R.B. v. Howell Chevrolet Co., 204 F. 2d 79, affirmed without discussion on this point, 346 U.S. 482; 7/ Ng Yip Yee v. Barber, 267 F.2d 206, 209; Quon v. Niagara Fire Ins. Co. of N.Y., 190 F. 2d 257, 259;

7/ This Court there stated that the argument that it is well settled law that where a witness' testimony is not contradicted a trier of fact has no right to refuse it (p. 86)--

> * * * is an ancient fallacy which somehow persists despite the courts' numerous rulings to the contrary. It overlooks the significance of the carriage, behavior, bearing, manner and appearance of a witness, -- his demeanor, -- when his testimony is given orally in the presence of the trier of facts.

Mitsugi Nishikawa v. Dulles, 235 F. 2d 135, 140, reversed, 356 U.S. 129; Lau Ah Yew v. Dulles, 257 F. 2d 744. This is exactly what the Tax Court did (R. 82):

> We have considered the testimony of petitioner's witnesses as to compensation paid for comparable services in comparable businesses. We are not bound by the valuation opinions of these witnesses, even though uncontradicted. Golden Construction Co. v. Commissioner, 228 F. 2d 637 (C.A. 10, 1955), affirming a Memorandum Opinion of this Court. Moreover, much of this testimony consisted of conclusions which were of limited assistance to this Court. At any rate, in the light of the facts of record, this testimony did not prove helpful in determining the reasonableness of the compensation paid to Rodgers during the fiscal year before us.

As to particular witnesses, David Lees at no time revealed his compensation or the gross or net profit of his corporation, although he stated that all were comparable to the facts presented in the instant case. Moreover, it is unclear what year he was using for comparative purposes, a factor of importance because of the additional increase in compensation for the fiscal year ending January 31, 1964. 8/ (II-R. 46-48.) The testimony of William Wiley is similarly of no value since he was engaged in a different type of trading and did not disclose his gross profits for comparative purposes, and, most important, he operated a sole proprietorship, which would render useless any comparison of salary with that of a corporate employee. (II-R. 55, 56.) Harold Brevig's testimony as to average rate of return of his other clients was incomplete for purposes of

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8/ The Tax Court was well within its power in refusing to recognize the witness David Lees as an expert on salaries paid in this type of business and, under the circumstances, correctly limited his testimony to the best evidence he could offer -- his own compensation. See 4A Mertens, Law of Federal Income Taxation (Rev.), Section 25.83.

any comparison (II-R. 34-35), and his comparison of other companies was completely irrelevant since they were substantially larger than taxpayer and engaged in different businesses. Brevig also lacked the specific knowledge as to these companies necessary for comparative purposes. (II-R. 32-34.) Finally, Rodgers' testimony may be considered only in the light of its self-serving nature. (II-R. 14-27.)

CONCLUSION

In the final analysis, the examination of many factors indicates that the Tax Court correctly upheld the Commissioner's determination that reasonable compensation for each of the two years in question was $30,000. As stated by the court (R. 83), "We have considered all of the evidence and all of the petitioner's arguments and we do not believe that petitioner has met its burden of proof." The trial court's purely factual determination, not being clearly erroneous, should be affirmed.

Respectfully submitted,

RICHARD C. PUGH,
Acting Assistant Attorney General.

MEYER ROTHWACKS,
HOWARD J. FELDMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

AUGUST, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of July, 1967.

HOWARD J. FELDMAN
Attorney

APPENDIX

Internal Revenue Code of 1954:

SEC. 162. TRADE OR BUSINESS EXPENSES.

(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including--

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

* * * * *

(26 U.S.C. 1964 ed., Sec. 162.)

SEC. 404. DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN.

(a) [as amended by Sec. 24(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606] General Rule.--If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under section 162 (relating to trade or business expenses) or section 212 (relating to expenses for the production of income); but, if they satisfy the conditions of either of such sections, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

* * * * *

(26 U.S.C. 1964 ed., Sec. 404.)

Treasury Regulations on Income Tax (1954 Code):

§1.162-7. Compensation for personal services.

(a) There may be included among the ordinary and necessary expenses paid or incurred in carrying on any trade or business a reasonable allowance for salaries or other compensation for personal services actually rendered. The test of deductibility in the case of compensation payments is whether they are reasonable and are in fact payments purely for services.

(b) The test set forth in paragraph (a) of this section and its practical application may be further stated and illustrated as follows:

(1) Any amount paid in the form of compensation, but not in fact as the purchase price of services, is not deductible. An ostensible salary paid by a corporation may be a distribution of a dividend on stock. This is likely to occur in the case of a corporation having few shareholders, practically all of whom draw salaries. If in such a case the salaries are in excess of those ordinarily paid for similar services and the excessive payments correspond or bear a close relationship to the stockholdings of the officers or employees, it would seem likely that the salaries are not paid wholly for services rendered, but that the excessive payments are a distribution of earnings upon the stock. An ostensible salary may be in part payment for property. This may occur, for example, where a partnership sells out to a corporation, the former partners agreeing to continue in the service of the corporation. In such a case it may be found that the salaries of the former partners are not merely for services, but in part constitute payment for the transfer of their business.

(2) The form or method of fixing compensation is not decisive as to deductibility. While any form of contingent compensation invites scrutiny as a possible distribution of earnings of the enterprise, it does not follow that payments on a contingent basis are to be treated fundamentally on any basis different from that applying to compensation at a flat rate. Generally speaking, if contingent compensation is paid pursuant to a free bargain between the employer and the individual made before the services are rendered, not influenced by any consideration on the part of the employer other than that of securing on fair and advantageous terms the services of the individual, it should be allowed as a deduction even though in the actual working out of the contract it may prove to be greater than the amount which would ordinarily be paid.

(3) In any event the allowance for the compensation paid may not exceed what is reasonable under all the circumstances.

compensation is only such amount as would ordinarily be paid for like services by like enterprises under like circumstances. The circumstances to be taken into consideration are those existing at the date when the contract for services was made, not those existing at the date when the contract is questioned.

(4) For disallowance of deduction in the case of certain transfers of stock pursuant to employees stock options, see section 421 and the regulations thereunder.

(26 C.F.R., Sec. 1.162-7.)

§1.162-9. Bonuses to employees.

Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered. It is immaterial whether such bonuses are paid in cash or in kind or partly in cash and partly in kind. Donations made to employees and others, which do not have in them the element of compensation or which are in excess of reasonable compensation for services, are not deductible from gross income.

(26 C.F.R., Sec. 1.162-9.)

§1.404(a)-1. Contributions of an employer to an employees' trust or annuity plan and compensation under a deferred payment plan; general rule.

* * * * *

(b) In order to be deductible under section 404(a), contributions must be expenses which would be deductible under section 162 (relating to trade or business expenses) or 212 (relating to expenses for production of income) if it were not for the provision in section 404(a) that they are deductible, if at all, only under section 404(a). Contributions may therefore be deducted under section 404(a) only to the extent that they are ordinary and necessary expenses during the taxable year in carrying on the trade or business or for the production of income and are compensation for personal services actually rendered. In no case is a deduction allowable under section 404(a) for the amount of any contribution for the benefit of an employee in excess of the amount which, together with other deductions allowed for compensation for such employee's services, constitutes a reasonable allowance for compensation for the services actually rendered. What constitutes a reasonable allowance depends upon the facts in the particular case. Among

the elements to be considered in determining this are the personal services actually rendered in prior years as well as the current year and all compensation and contributions paid to or for such employee in prior years as well as in the current year. Thus, a contribution which is in the nature of additional compensation for services performed in prior years may be deductible, even if the total of such contributions and other compensation for the current year would be in excess of reasonable compensation for services performed in the current year, provided that such total plus all compensation and contributions paid to or for such employee in prior years represents a reasonable allowance for all services rendered by the employee by the end of the current year. A contribution under a plan which is primarily for the benefit of shareholders of the employer is not deductible. Such a contribution may constitute a dividend within the meaning of section 316. See also §§1.162-6 and 1.162-8. In addition to the limitations referred to above, deductions under section 404(a) are also subject to further conditions and limitations particularly provided therein.

* * * * *

(26 C.F.R., Sec. 1.404(a)-1.)

NO. 21671

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IFIC GRAINS, INC.,

Appellant,

v.

MISSIONER OF INTERNAL
ENUE,

Appellee.

APPELLANT's REPLY BRIEF

TZ, SOUTHER, SPAULDING,
KINSEY & WILLIAMSON
.iam H. Kinsey
hen B. Hill
.2th Floor Standard Plaza
Portland, Oregon 97204

orneys for Appellant

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APPELLANT'S REPLY BRIEF

ARGUMENT

THE DECISION OF THE TAX COURT IS CLEARLY ERRONEOUS EVEN WITHOUT TAKING INTO ACCOUNT UNDERPAYMENT FOR PRIOR YEARS

Although the Commissioner frames the issue in terms of "... ther there is substantial evidence to support the Tax Court's ding that reasonable compensation deductible by taxpayer for ary and bonuses paid to Robert R. Rodgers, its president and e shareholder, was $30,000 for each of the fiscal years ending uary 31, 1963 and January 31, 1964" (Br 6), only two sentences the Commissioner's brief purport to explain or justify ection of the $30,000 as the maximum allowable compensation uction. These two sentences read as follows (Br 11):

"Taxpayer had become active in the trading business in 1961, and the $29,000 paid to Rodgers for the fiscal year ending January 31, 1962, consisting of $24,000 in salary and $5,000 bonus would appear to reflect all increased compensation due to him for his services with respect to the trading aspects of the business. 2/ (I.R. 77, 80.) The Record does not show an increase in Rodgers' duties and responsibilities commensurate with the sudden increase in compensation by 40 percent and 90 percent for the two years here at issue. 3/"

ote 3/ to the above quotation relates that the $30,000
mination represents allowance of approximately the same
nsation for the fiscal years ended January 31, 1963 and
as the $29,000 paid Rodgers for the fiscal year ended
ry 31, 1962.

The above reviewed portion of the Commissioner's brief makes ear that substantiation of $30,000 as the maximum allowable nsation for the fiscal years ended January 31, 1963 and 1964 unded upon the following dual propositions:

(1) The $29,000 paid Rodgers for the year ended January 31, 1962 reflected all compensation due him for his services on behalf of Petitioner, including his duties as a trader, this being the first year of extensive trading activities conducted by Rodgers.

(2) Any substantial increase in compensation for years subsequent to the fiscal year ended January 31, 1962 is unreasonable unless the increase is supported by a commensurate increase in duties and responsibilities.

re of either proposition destroys the basis for the Com-
oner's $30,000 determination and renders clearly erroneous
ax Court's decision sustaining such determination. Failure
ther proposition leaves the Commissioner and the Tax Court
ut any affirmative evidence to suppprt their determination
$30,000 was the maximum allowable compensation deduction

the fiscal years ending January 31, 1963 and January 31, 1964.

No evidence having been presented by the Commissioner, position (1) is a pure inference drawn from the mere fact that itioner paid Rodgers $29,000 for the fiscal year ended uary 31, 1962. Whether or not there may be fact situations ch justify the inference that payment of specified compensation a controlling stockholder for a given year establishes such unt as the maximum level of reasonable compensation for the e of services performed during the year, the inference is pplicable to Petitioner's fiscal year ended January 31, 1962. inference should not conflict with common sense. The fiscal r ended January 31, 1962 was the year of transition when Rodgers menced extensive trading operations to compensate for the drop warehousing and the grain storage business. Financial success a new venture may be luck rather than skill. It is sensible wait and see whether the success is repeated in subsequent rs before fully evaluating the services through increased pensation. Also, the $7,000 increase given Rodgers for the cal year ended January 31, 1962 was the precise sum needed to ng Petitioner's taxable income within the $25,000 surtax exemption. s negates any inference that $7,000 represented a premeditated ing of the maximum increase Rodgers merited because of the ed duties resulting from the trading aspects of the business.

Proposition (2), likewise necessary to suppprt the Com- sioner's $30,000 determination, assumes that increased duties

responsibilities are the only justifications for additional pensation.[1] This is clearly wrong. Increased productivity the performance of existing duties and responsibilities is ally deserving of monetary reward. Here, 85 percent of itioner's gross income (R 17, Stip. para. 6) and practically of the net income (Tr. 17-8, 39) was derived from trading ivities conducted by Rodgers. As stipulated, "... a serious or in judgment would have been financially disastrous" (R 18, p. para. 8). Thus, there was a direct relationship between efforts of Rodgers and the financial well being of Petitioner.

Not only did Rodgers avert financial disaster, but Rodgers' ding activities during the two years at issue substantially reased Petitioner's net income over that earned for the fiscal r ended January 31, 1962, the first year of trading. Having oneously assumed that additional compensation could be justified y by increased duties and responsibilities, the Tax Court did consider whether Rodgers' increased productivity during the ond and third years of trading warranted greater compensation n during the first year. When increased productivity of Rodgers the performance of existing duties and responsibilities is ognized as a justification for additional compensation,

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1 Contrary to the assertion of both the Commissioner the Tax Court, the work and duties of Rodgers did increase. dollar volume of sales for the fiscal year ended January 31, 4 had increased by thirty-four percent over the dollar volume sales for the fiscal year ended January 31, 1962 (R 18, Stip. a. 9). Most of such increase coming from trading by Mr. Rodgers grass seed on a world-wide basis (R 18, Stip. para. 8).

tation of the increase to $1,000 is clearly erroneous.[2]

A whopping fifteen percent return on invested capital ital plus retained earnings) was realized by Petitioner even r payment of the compensation alleged to be unreasonable. capital is liberally compensated, how can payment for ser- s be unreasonable? The Commissioner does not deny that tioner had a high return on invested capital, but attempts rush this aside with the observation that return on invested tal is merely one of many factors to be considered (Br. 11). ver, the other factors mentioned by the Commissioner have ificance only as to the inquiry of whether capital is being uately compensated.[3] Such factors are indirect indications hat the rate of return on invested capital has answered ctly.

Most of Defendant's argument belabors admitted facts such he lack of dividends paid by Petitioner, and declaration of bonuses at the end of the year after the profits were known. r explained by Defendant is exactly what bearing these facts

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2 It is absurd to presume that a man is of little or no tional value in his second and third year of work in a new ness than in his first year. This is especially true in ing where only through experience does one acquire a feel of market.

3 The Commissioner cites these various percentages for fiscal years here in dispute without any attempt to compare with comparable companies in the trading or grain storage ness or with petitioner's prior years. Without one of these eria for comparison these percentages are completely devoid eaning. That Rodgers' salary was 61 percent of Petitioner's me before the deduction of his salary and 17 percent of Peti- er's gross profit is by itself far from being an inherently cal or even possible indication of unreasonable compensation.

upon the issue as framed by him, - whether there is substan-
evidence to support the Tax Court's finding that reasonable
ensation to Rodgers was $30,000 for each of the years at
e.

While lack of dividends has sometimes been cited in cases
llowing compensation deductions, it is merely a corroborating
ideration used as a supplement to other substantial evidence,
r as a determining factor in and of itself.[4] Unless it would
conomically sensible for a corporation to pay dividends, the
thereof should not be a pertinent consideration even as a
oborating factor. It would have been economic folly for
tioner, with less than $100,000 surplus to have paid a divi-
while embarked upon a new, uncertain venture.

The whole argument of the Commissioner supporting the Tax
t decision is exemplified in the following sentence:

> "To summarize, the overall picture shows increased profits matched by higher salaries -- an indication of the drawing off of corporate profits to controlling stockholders."

tioner agrees that the overall picture certainly does show
easing profits coupled with higher salaries. Why, though,
uch an overall picture an indication of the drawing off of

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4 As stated by the Court in Brinkwald Inc. v. United
es, 334 F.2d 639, 644 (Ct. Cl. 1964), "the mere fact that
rporation has never paid any dividends would not, in and of
lf, justify the conclusion that the salaries paid to an
oyee-stockholder were a distribution of dividend."

rporate profits to controlling stockholders?[5] Increasing
fits are normally coupled with higher salaries, particularly
a case of a small corporation which has paid small compensa-
n during early, formative years.[6] Moreover, Petitioner did
limit its higher compensation only to Rodgers. The compen-
ion of the nonshareholder-employees was substantially
reased.[7]

The absurdity of $30,000 being the maximum level of
sonable compensation is no more forcibly shown than when this
ure is compared with the compensation paid Rodgers' assistant,
l Everson. Although Everson performed no trading functions
26), Everson earned over $19,800 in salary and bonus for the
cal year ending in 1964 (R 19, Stip. para. 11). The Commis-
ner did not even attempt to claim that this compensation was
easonable. Can it be that the employee of ultimate

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5 Where the success and earnings of a corporation are
ectly attributable to the hard work, skill, and success of
employee, the reasonable compensation of such employee grows
h the growth of the corporation. See, e.g., Watertown
ttoir Co., 22 CCH Tax Ct. Mem. 258, 268 (1963); Hamilton and
pany, Inc. 18 CCH Tax Ct. Mem. 665, 667 (1959); Schaberg-
trich Hardware Co., 6 CCH Tax Ct. Mem. 269, 275 (1947).

6 As observed by the court in Commercial Iron Works v.
missioner, 166 F.2d 221, 224 (5th Cir. 1948) it is reasonable
iness practice "for an employer to recognize and reward
rifices made by employees in hard, formative days by granting
ore generous compensation in the days that are lush."

7 The compensation for the fiscal year ending in 1964
petitioner's two other principal employees increased by 45.2%
r their compensation in the prior year, while Rodgers'
pensation for the fiscal year ending in 1964 increased by
y 33.8% over the prior year.

ponsibility, the employee who directed Petitioner into a new rse of activity which turned potential financial havoc into r increasing financial success, the employee whose hard work skill as a trader had accounted for nearly all of the itioner's net income for the years here in dispute, and the loyee on whom the success of Petitioner is completely endent is worth only $30,000 while his assistant who performs trading functions is admittedly worth over $19,800? Is gers only $10,200 more valuable than Everson to Petitioner?

Both the Tax Court and Commissioner do considerable plaining about the adequacy of Petitioner's evidence. An ropriate answer to such complaint is contained in the follow- statement from Taylor & Co. v. Glenn, 62 F.Supp. 495, 499 D. Ky. 1945) quoted with approval in Mayson Mfg. Co. v. missioner, 178 F.2d 115, 121 (6th Cir. 1949); Baltimore ry Lunch, Inc. v. United States, 231 F.2d 870, 875 (8th Cir. 6); and Robert Louis Stevenson Apts. Inc. v. Commissioner, F.2d 681, 688 (8th Cir. 1964):

> "...If the compensation received...was unreasonable for the services rendered, certainly the government could have produced some experienced witness... who would have said so. The lack of such evidence operates very strongly against the defendant's contention." (emphasis added)

itioner produced the most "comparable" witnesses it could d. They were direct competitors, and understandably declined publicly disclose their exact compensation. Such reluctance uld not relegate their testimony to the category of "little istance" as asserted by the Tax Court. The witnesses knew

compensation of Rodgers in relation to their own. [illegible] univocally testified that the compensation of Rodgers was arable to theirs. One witness further testified that the ensation paid to Rodgers in view of the Petitioner's net its was not unusual and that he knew of competitors whose ensation was comparable to Rodgers (Tr 45 - 46). What should be expected?[8] In contrast, there is much more Commissioner could have done. To repeat the above pertinent ement, if Rodgers' compensation was really out of line, the issioner could have produced one witness who could have said

Despite the assertions of the Commissioner, the rule of court is that uncontradicted and unimpeached testimony may be disregarded. See Grace Bros. v. Commissioner, 173 F.2d

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8 The fact that much of the testimony was conclusionary due in most part to the Tax Court's own handling of the oral eedings. Having already erroneously prevented Petitioner's ess (David Lees) from testifying as to his opinion of the onableness, counsel for the Petitioner was in a somewhat of andary as to what the court desired to hear. Counsel for Petitioner inquired of the court whether he should not mpt to elicit in greater detail the facts of the comparable- from the witness but the court stated that the testimony as n was enough (Tr 46).

9 A corporate taxpayer must set forth separately on its return the compensation paid to each corporate officer. Commissioner, therefore, has ready access to the compensation rds of a petitioner's competitors. If the Commissioner ot with this available information produce one competitor estify as to his compensation being less than that paid by taxpayer, it is only logical for a strong presumption to e that the compensation paid was reasonable when a competitor testified that his compensation was comparable.

174 (9th Cir. 1949); [illegible] F.2d 253, 260 (9th Cir. 1963). The cases cited by [illegible] issioner declare only "uncontradicted" testimony [illegible] ollowed if the demeanor of the witness or the improbability [illegible] he witness' story indicate that the witness' testimony is worthy of belief. See, e.g., Scates v. Isthmian Union, , 319 F.2d 798, 799 (9th Cir. 1963); Ramos v. Matson gation Company, 316 F.2d 128, 132 (9th Cir. 1963). These s are really saying nothing different than was stated by court in Grace Bros. v. Commissioner, supra at 174:

> "It is axiomatic that uncontradicted testimony must be followed. [Citations] The only exception to the rule occurs when we are dealing with testimony by witnesses who stand impeached and whose testimony is contradicted by the testimony of others or by physical or other facts actually proved or with testimony which is inherently improbable." [10]

In all of the cases cited by the Commissioner, the trial t or hearing officer had specifically found the testimony of witness in question to be unworthy of belief.[11] In the ent case, however, the Tax Court neither expressed nor ied any reservation with regard to the credibility of the imony[12] of either Mr. Lees or Mr. Wiley.[13] Moreover, in all

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10 In essence this Court is saying that uncontradicted imony which is worthy of belief may not be disregarded.

11 The trial court must clearly indicate in its findings the testimony is unworthy of belief. See Ramos v. on Navigation Company, 316 F.2d 128, 132 (9th Cir. 1963).

12 If the testimony had not been creditable, the testi- could not have been of even "limited assistance to the t" (R 82).

13 The testimony being uncontradicted (R 82) and there g no question as to the credibility of the testimony, the Court was bound by the testimony as a matter of law.

cases cited by the Commissioner the fact situation ... s such ... it was quite possible no opposing witnesses were available. ... is not the situation in a "reasonable compensation" tax ... As previously observed, the Commissioner can certainly ...duce at least one witness if compensation is really ...easonable. In the instant case, lack of contradicting ...timony raises a strong inference that none of the witnesses ...urable through the Commissioner's vast contacts and ...ources could have testified that Rodgers was overcompensated ... the years at issue.

The Tax Court has given a complete reverse twist to ... statement of the court in Taylor & Co. v. Glenn, supra. ...er than holding that the Commissioner's failure to produce ...tness operates very strongly against him, the Tax Court ...arages the witnesses presented by Petitioner although they ... the most competent Petitioner could find within its ...arative limited sphere of contacts. This stacking of the ... against Petitioner was compounded by the Tax Court's ...sal to let Mr. Lees express his opinion concerning the worth ...odgers.[14]

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14 The authority cited by Commissioner in his attempt to ...ify the Tax Court's refusal to allow Mr. Lee's opinion not ... does not support his position but in fact supports a posi- ... more encompassing than that set forth in Petitioner's ...ing brief: "Opinion testimony as to reasonableness of ...ensation is always relevant but its probative value will vary ... case to case. Obviously, the opinion of an expert is ...rally more valuable than that of a nonexpert." 4A Mertens, ...ral Income Taxation, Sec. 25.63 (Rev. Ed. 1966). Thus, not ... may an expert but also a nonexpert testify.

However, as explained in Petitioner's opening brief, ... only expertise required of a witness is that he be familiar ... the particular trade or business in the local area, with ... taxpayer in his operations, and with the capabilities and

Just as the Commissioner and Tax Court can be heard to criticize the uncontradicted and unimpeached testimony of esses whose veracity and credibility have not been tioned, the Commissioner cannot be heard to criticize tioner's evidence concerning return on invested capital, icularly where the only ground for objection is alleged lack omparability.[15] If a return in excess of fifteen per cent ot remarkable for Petitioner's type of business, the issioner could have produced contradicting figures since as access to the rate of return on invested capital for y taxpaying corporation in the country.

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of the employee whose compensation is in question. Such rtise, Mr. Lees clearly had. But as seen from the Commission- cited authority, whether Mr. Lees was an expert or not, his ion testimony was admissible evidence. The Tax Court was, efore, required to hear this admissible evidence, and by sing to do so, the Tax Court was clearly in error. It is matic that a judge, even when sitting as a trier of fact hear all evidence of probative value not forbidden by some ific rule. See I Wigmore, Evidence, Sec. 10 (3rd Ed. 1940); rd, Sica v. United States, 325 F.2d 831, 836 (9th Cir. 1963).

15 Through the testimony of Mr. Brevig, Petitioner did blish comparability. Brevig testified that he did accounting for other local companies that could be considered comparable etitioner, and that he determined by computation that not of these other clients had a higher rate of return on invested tal (Tr 34). He further explained that the local companies hich he referred were primarily in the trading business like Petitioner and that trading was at least as large a part of r business as it was of the Petitioner's business (Tr 35).

ANY POSSIBLE DOUBT CONCERNING THE REASONABLENESS OF RODGERS' COMPENSATION IS ELIMINATED WHEN UNDERPAYMENTS DURING PRIOR YEARS ARE TAKEN INTO ACCOUNT

The Commissioner contends that services rendered and compensation paid during prior years can be taken into account only some portion of the compensation for the year of determination expressly earmarked as compensation for past services, preferably by a board resolution. All of the cases cited by the Commissioner for his earmarking proposition discuss the absence of evidence indicating prior underpayment,[16] with the exception of E.B. & A.C. Whiting Co., 10 TC 102 (1948). In this latter case the board resolution specifically provided that the bonus was for services rendered during the present fiscal year." E.B. & A.C. Whiting Co., supra at 117.[17] In no case has a Court found prior underpayment, but nevertheless declined to take same into account merely because there was no earmarking, i.e., no express

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16 "Petitioner corporation further contends that the amount was partly to compensate him for past services rendered during the four preceding fiscal years, claiming that in each of those years his salary was unreasonably low. The short answer is, that there is no factual basis of the record to support this contention." Perlmutter, 44 T.C. 382, 403 (1965), aff'd. 373 F.2d 45 (10th Cir. 1967).

"There is no evidence before us that the officers in question were underpaid over the previous years..." L. E. Pinkham Medicine Co. v. Commissioner, 128 F.2d 986, 990 (1st Cir. 1942).

"Conceding that the salaries from 1927 to 1937 were inadequate, the record clearly indicates that the corporation made corrections therefor prior to the taxable years." Standard Asbestos Mfg. and Insulating Co. v. Commissioner, 276 F.2d 289, 293 (8th Cir. 1960).

17 In this case as well, upon viewing all the facts there appears to be no evidence of underpayment in prior years.

ement that a portion of the compensation for the year of rmination was intended as compensation for prior underpayments. he other hand, the Court took prior underpayments into account out evidence of earmarking in the case of Jewel Ridge Coal s, Inc. 16 CCH Tax Ct. Mem. 140 and Ernest Burwell, Inc. v. ed States, 113 F.Supp. 26 (W.D.S.C. 1953). The rule is ectly stated as follows in Jewel Ridge Coal Sales, Inc., supra 43:

> "...That the services need not be rendered during the taxable year is well settled. It is only necessary that the liability for the compensation be either paid or incurred within the year for which deduction is sought. Lucas v. Ox Fibre Brush Co. 281 U.S. 115 (1930)."

Naturally, a corporation will not earmark compensation for r services unless prior underpayment is believed to exist, so arking may have some evidentiary value in establishing prior rpayment. However, where prior underpayment is otherwise ent and established, lack of earmarking becomes immaterial. ucas v. Ox Fibre Brush Co., 281 U.S. 115 (1930) the issioner on appeal to the Supreme Court embraced the corporate lutions providing that the compensation paid for the year at e was in recognition for prior services. According to the issioner, compensation paid for prior services was not ctible because taxes are determined on an annual basis and ormance of the services, as well as payment for accrual, must r in the same taxable year. The Supreme Court rejected this ention and held that the services need not be rendered during taxable year, it only being necessary that liability for the ensation be either paid or incurred within the year for which

uction is sought. It would represent a gross perversion of as v. Ox Fibre Brush Co. to hold that consideration of prior erpayment in determining the reasonableness of compensation a current year is permitted only when corporate resolutions ressly provide that the compensation is in recognition of or underpayments.

At the beginning of his argument (Br 9) the Commissioner ates that the resolutions of Petitioner's board of directors , for all intents and purposes, expressions of Rodgers' will. iously, it was Rodgers' will that his compensation be uctible in full by Petitioner, so the board of directors uld be deemed to have adopted any and all resolutions which ilitate realization of his will. Why put arbitrary limitations the potency of Rodgers' will? It certainly does not make se for the Commissioner to pooh pooh the significance of porate resolutions in one part of his brief, and then cite k of particular corporate resolutions as grounds for not ing into account obvious prior underpayments which the missioner as much as admits would sustain in full the compensa-
n deductions.[16]

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16 There can be no doubt that Rodgers was previously under-d. His aggregate compensation from Petitioner over his nine r period of employment averaged only $22,860.00 per year, le his average annual compensation from his prior employer, ry Warehouse Co., a corporation in which Rodgers owned no ck, was $26,050.00 per year for his management services ch demanded less responsibility, skill and work than his vices for Petitioner.

Nothing is said about earmarking in Treas. Reg. Sec.)4(a)-1(b). As therein unequivocally stated, among the ments to be considered in determining what constitutes a sonable allowance for compensation for services rendered are personal services actually rendered in prior years as well the current year and all compensation and contributions paid or for such employee in prior years as well as in the current r.

The Commissioner contends that the language of Treas. . Sec. 1.404(a)-1(b) does not have applicability to compensa- n deductions under Section 162. This assertion is contrary the introductory sentences of Treas. Reg. Sec. 1.404(a)-1(b) ch reads:

> "(b) In order to be deductible under section 404 (a), contributions must be expenses which would be deductible under section 162 (relating to trade or business expenses) or 212 (relating to expenses for production of income) if it were not for the provision in section 404(a) that they are deductible, if at all, only under section 404(a). Contributions may therefore be deducted under section 404(a) only to the extent that they are ordinary and necessary expenses during the taxable year in carrying on the trade or business or for the production of income and are compensation for personal services actually rendered...."

ce a contribution is deductible under Section 404(a) only if is an expense which would be deductible under Section 162 as pensation for personal services actually rendered, anything ring upon deductibility of compensation under Section 404(a) equal applicability to Section 162.

The following sentence of Treas. Reg. Sec. 404(a)-1(b) ediately precceds the portion of this section quoted in itioner's brief on page 28:

> "...In no case is a deduction allowable under section 404(a) for the amount of any contribution for the benefit of an employee in excess of the amount which, together with other deductions allowed for compensation for such employee's services, constitutes a reasonable allowance for compensation for the services actually rendered...."

underlined portion of the above sentence is identical in ning to the below underlined quotation from Treas. Reg. Sec. 62-9 entitled "Bonuses to Employees":

> "Bonuses to employees will constitute allowable deductions from gross income when such payments are made in good faith and as additional compensation for the services actually rendered by the employees, provided such payments, when added to the stipulated salaries, do not exceed a reasonable compensation for the services rendered...."

as. Reg. Sec. 1.162-9 was adopted by the Commissioner after as. Reg. Sec. 1.404(a)-1. If the provisions of Section 04(a)-1(b) were not meant to apply under Section 1.162-9, Commissioner would have so stated.

CONCLUSION

Whether the underpayment of Rodgers in prior years is sidered or not, the Petitioner has presented ample, ontradicted evidence worthy of belief which establishes that compensation paid to Rodgers by Petitioner for the fiscal rs ending in 1963 and 1964 was reasonable. In contrast, the missioner and the Tax Court has pointed to no affirmative dence in support of their determination that $30,000 was the imum level of reasonable compensation for these years. The ision of the Tax Court, being without support in the evidence, clearly erroneous.

For these and other reasons set forth herein and in itioner's opening brief, this Court should reverse the ision of the Tax Court and allow Petitioner a deduction for the compensation paid to Rodgers for the fiscal years ended uary 31, 1963 and January 31, 1964.

Respectfully submitted,

MAUTZ, SOUTHER, SPAULDING
KINSEY & WILLIAMSON

William H. Kinsey SBH
William H. Kinsey

Stephen B. Hill
Stephen B. Hill
12th Floor, Standard Plaza
Portland, Oregon 97204

Of Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation this brief, I have examined Rules 18 and 19 of The ted States Court of Appeals for the Ninth Circuit, and t, in my opinion, the foregoing brief is in full compliance h those rules.

Stephen B. Hill

Of Attorneys for Appellant